UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

VOL. 45 NO. 3

PAGES 913-1439

MAY-JUNE 1986

Compiled And Published By:

Editor, Agriculture Decisions

Hearing Clerk Unit

Office Of Administrative Law Judges

U.S. Department Of Agriculture

Room 1079 South Building

Washington, D.C. 20250

Direct all inquiries regarding this publication
to the address indicated above.

PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

TABLE OF CONTENTS

MAY-JUNE 1986

PAGE

LIST OF DECISIONS REPORTED, MAY-JUNE 1986 913

AGRICULTURE MARKETING AGREEMENT ACT, 1937

COURT DECISION 923

PROCEEDINGS ON PETITIONS 928

ANIMAL QUARANTINE AND RELATED LAWS 939

ANIMAL WELFARE ACT 970

FEDERAL MEAT INSPECTION ACT 988

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS 989

REPARATION DECISIONS 1135

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS 1150

DISCIPLINARY DECISIONS 1152

REPARATION DECISIONS 1215

REPARATION DEFAULT DECISIONS 1381

PLANT QUARANTINE ACT 1402

SUBJECT INDEX, MAY-JUNE 1986 1430

NOTE

A list of decisions reported and a subject index are published in each issue of Agriculture Decisions. A list of decisions reported and a subject index for the entire volume (or calendar year) are published in the November-December issue.

MAY-JUNE 1986

AGRICULTURAL MARKETING ACT OF 1937 PAGE

PROCEEDINGS ON PETITIONS

VALLEY FARMS, INC. AMA Docket No. M 4-22. Decision and Order 928

COURT DECISION:

COUNTY LINE CHEESE COMPANY and MEADOW GOLD DAIRY *v.* JOHN R. BLOCK, SECRETARY, DEPARTMENT OF AGRICULTURE and ASSOCIATED MILK PRODUCERS, INC. Civil Action No. 85 C 1811. Memorandum Opinion and Order 923

ANIMAL QUARANTINE AND RELATED LAWS

BUFORD, CLARK. A.Q. Docket No. 244. Consent Decision and Order 951
CANNON, MARGY. A.Q. Docket No. 242. Consent Decision 940
CODY, ROBERT "BOB". A.Q. Docket No. 252. Consent Decision 953
CONRAD, DONALD. A.Q. Docket No. 235. Consent Decision and Order 954
COX, HORACE R. A.Q. Docket No. 160. Dismissal of Complaint 969
DOBSON, JOHNNY. A.Q. Docket No. 251. Consent Decision and Order 948
DOSS, JIM, RONALD O. EHRLIGH and DR. PHILLIP SMITH, D.V.M. A.Q. Docket No. 136. Consent Decision for Ronald O. Ehrlich 944
GIBSON, GORDON. A.Q. Docket No. 250. Consent Decision and Order 962
GUTMAN BROTHERS, LTD. A.Q. Docket No. 225. Decision and Order 956
HALLEY, SR., LONGINO. A.Q. Docket No. 258. Consent Decision and Order 967
HUGHES, JIMMY. A.Q. Docket No. 253. Consent Decision and Order 950
FILSINGER, DVM, WILLIAM C. VA Docket No. 37. Default Decision and Order 965
LAMBETH, BONNIE. A.Q. Docket No. 231. Consent Decision 945
OUTLAW, MORGAN. A.Q. Docket No. 241. Consent Decision 939
ROWAN, BILLY E. A.Q. Docket No. 187. Default Decision and Order 963
SASSEEN, DOUG, and RANDALL HOOVER d/b/a OZARKS REGIONAL STOCKYARD A.Q. Docket No. 229. Order Dismissing Complaint 969
TARVER, LANCE, and TOMMY COLEMAN. A.Q. Docket No. 221. Default Decision and Order 942
TEXAS LIVESTOCK MARKETING ASSOCIATION, INC., DUDE HARRISON and A. J. LINDSEY. A.Q. Docket No. 141. Consent Decision and Order 947
BOOTH, JONI. AWA Docket No. 289. Order to Dismiss 987

ANIMAL WELFARE ACT

CITY OF NEW BEDFORD, MASSACHUSETTS. AWA Docket No. 386. Consent Decision and Order 98
FOSTER, DONALD D., d/b/a WHITE GATE KENNELS. AWA Docket No. 375. Consent Decision 98
FOSTER, JIM and MARY, d/b/a OAK LEAF KENNELS. AWA Docket No. 371. Consent Decision 97
HAMPTON, HENRY d/b/a HAMPTON ENTERPRISE. AWA Docket No. 372. Consent Decision 98

ANIMAL WELFARE ACT—Cont. PAGE

LOGAN COLLEGE OF CHIROPRACTIC. AWA Docket No. 345. Consent Decision 978
QUAS, GARY, d/b/a BAMBI PARK. AWA Docket No. 379. Order to Dismiss 987
STATE UNIVERSITY OF NEW YORK. AWA Docket No. 346. Consent Decision 976
STEPHENS, RICK. AWA Docket No. 382. Consent Decision 981
ZARTMAN, MARLIN U., d/b/a GILBERTSVILLE SALES STABLES. AWA Docket No. 292. Decision and Order 970

FEDERAL MEAT INSPECTION ACT

GREEN LAKE MEATS, INC. FMIA Docket No. 89. Dismissal of Complaint 988

PACKERS AND STOCKYARDS ACT, 1921

DISCIPLINARY DECISIONS:

BOARDMAN, OWEN A. P&S Docket No. 6694. Consent Decision 1087
BRODY & SONS, INC., HARRY, and HERBERT S. SMALL. P&S Docket No. 6575. Consent Decision 1053
BUSHELLE CATTLE COMPANY, INC. P&S Docket No. 6639. Order Denying Late Appeal 1131
CARTER-KIRCHOFF FEED YARD, INC. and BOB CARTER. P&S Docket No. 6611. Amendment of Order 1133
CIRCLE B. MEAT CO., INC. d/b/a FLORIDA BONELESS BEEF, and CIRCLE B. PORTION MEAT CO., GEORGE E. MUELLER, SR., and JAY A. MUELLER. P&S Docket No. 6614. Decision and Order with Respect to Circle B. Meat Co., Inc., and George A. Mueller, Sr., Upon Admission of Facts by Reason of Default 1073
COCHRAN, FRED, and DALE COCHRAN. P&S Docket No. 6693. Consent Decision 1116
CORN STATE MEAT COMPANY, INC., TERRANCE P. (TERRY) PRINCE, JR., and JAMES L. WIGGS, P&S Docket No. 6427. Decision and Order 995
COUNTRY CUTS OF IOWA, INC., DAVID F. OLSON, LUTHER GESME, JACK L. WARD, and RICHARD HOBSON. P&S Docket No. 6515. Consent Decision 1077
FARINELLI, JR., CELIVO NICK. P&S Docket No. 6642. Decision and Order Upon Admission of Facts by Reason of Default 1083
FARMERS LIVESTOCK AUCTION, INC. P&S Docket No. 6266. Supplemental Order 1130
GARVER, RICHARD N. P&S Docket No. 6449. Decision and Order 1090
GILES AND STRATTON AUCTION, INC., d/b/a LIVESTOCK PRODUCERS, FLOYD GILES, and RONNIE STRATTON, P&S Docket No. 6660. Consent Decision 1120
GLOVER, STANLEY V., v. LIMON LIVESTOCK EXCHANGE, and MIKE JORGENSEN. P&S Docket No. 6562. Order of Dismissal 1135
GRANT, DOUGLAS B., an individual, and GRANT LIVESTOCK, INC., a corporation. P&S Docket No. 6570. Decision and Order Upon Admission of Facts by Reason of Default 1079

PACKERS AND STOCKYARDS ACT, 1921—Cont.

DISCIPLINARY DECISIONS—Cont. PAGE

HENSLEY, RAYMOND. P&S Docket No. 6534. Consent Decision 1117
HOLIDAY FOOD SERVICES, INC., and NAT ROCKER, P&S Docket No. 6488. Decision and Order 1034
KLEMME CATTLE CO., INC. P&S Docket No. 6455. Decision and Order 1108
KOEBKE, LAWRENCE. P&S Docket No. 6603. Decision and Order Upon Admission of Facts by Reason of Default 991
KREWSON, TERRY, BOBBIE KREWSON, D. E. KREWSON, and LICKING LIVESTOCK AUCTION COMPANY, INC., P&S Docket No. 6702. Consent Decision 1122
LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH. P&S Docket No. 6174. Consent Decision with Respect to Chaim Treibatch 1106
LINDEN PACKING CO., INC. P&S Docket No. 6536. Decision and Order 1055
NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK, and GEORGE BITZ. P&S Docket No. 6678. Consent Decision with Respect to Donald A. Hauck 1126
NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK, and GEORGE BITZ. P&S Docket No. 6678. Consent Decision with Respect to Respondents Napoleon Livestock Auction, Inc., and George Bitz 1128
OLE SALEM PACKING CO., INC., and GREGORY H. MITCHELL. P&S Docket No. 6668. Consent Decision 1051
RANCHERS AND FARMERS LIVESTOCK AUCTION, INC. and L. KIRBY POWELL. P&S Docket No. 6692. Consent Decision. 993
SUPPLEMENTAL ORDER 1132
REDMAN, HARRY P. P&S Docket No. 6613. Consent Decision 1065
RIFFEE, ALLEN H. P&S Docket No. 6477. Supplemental Order 1133
RILEY, JEFFREY M., and JOE P. RILEY. P&S Docket No. 6553. Consent Decision 989
RIPPY, INC., JAY, d/b/a CATTLEMAN'S LIVESTOCK COMMISSION CO. P&S Docket No. 6568. Consent Decision 1088
ROYAL CREST MEATS, INC. P&S Docket No. 6643. Decision and Order Upon Admission of Facts by Reason of Default 1068
SCHOLL, JOHN A. P&S Docket No. 6684. Consent Decision 1085
SELECTED MEATS, INC., JOSEPH A. MEINDL, and ROBERT D. HINDSLEY. P&S Docket No. 6430. Consent Decision 1062
STAFFORD, CHARLES RAY, and ROBERT E. STAFFORD. P&S Docket No. 6445. Consent Decision 1070
TODD, RICHARD. P&S Docket No. 6664. Consent Decision 1066
UMBERGER, B. C. P&S Docket No. 6691. Consent Decision 1114
WESSELS, GARY. P&S Docket No. 6423. Supplemental Order 1132
WESTERN STOCKYARDS CORPORATION. P&S Docket No. 6680. Consent Decision 1071

REPARATION DECISIONS:

ZEMLISKA, LEO, d/b/a PROFESSIONAL FEEDER CONSULTANTS v. GLASGOW LIVESTOCK SALES CO., and ROBERT D. FJELDHEIM. P&S Docket No. 6064. Decision and Order 113

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 PAGE

COURT DECISIONS:

REEVES PRODUCE, INC. v. UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, Civil Actions 85-1602. Petition for Review of an Order of the United States Department of Agriculture 1151

REEVES, ROBERT L., v. UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, Civil Actions 85-1517, 85-1518, 85-1519. Petitions for Review of Orders of the United States Department of Agriculture 1150

DISCIPLINARY DECISIONS:

BATTAGLIA DISTRIBUTING COMPANY, INC. PACA Docket No. 2-7167. Consent Decision and Order 1211

ELLIOTT PRODUCE, EMERSON. PACA Docket No. 2-6970. Decision and Order 1199

GREEN VILLAGE FRUIT AND VEGETABLE, INC. PACA Docket No. 2-6845. Decision and Order 1202

GULFPORT TOMATOES, INC. PACA Docket No. 2-7085. Decision and Order 1201

H & J BROKERAGE, INC. PACA Docket No. 2-6437. Decision and Order . 1154

SOBIECH, TED. PACA Docket No. 2-6902. Consent Decision and Order ... 1152

Correction to Consent Decision 1153

REPARATION DECISIONS:

A.T.B. DISTRIBUTING CO. v. FRESHVILLE PRODUCE DISTRIBUTING INC. PACA Docket No. 2-7149. Reparation Order 1350

ALLEN, ALTON H., and JOHN M. COELHO d/b/a SUNSET STRAWBERRY GROWERS v. V. F. LANASA, INC. PACA Docket No. 2-6686. Order on Reconsideration 1378

ACTION PRODUCE v. INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7126. Reparation Order 1299

AGRI-PAK FRUIT CO. v. NICHO PRODUCE CO., INC. and/or SO. CENTRAL BROKERAGE, INC. PACA Docket No. 2-6723. Decision and Order 1354

BALL, RONALD J., and RUEY BALL d/b/a BALL BROS. PRODUCE v. BEACON PRODUCE CO. PACA Docket No. 2-7115. Reparation Order 1301

BARRETT PRODUCE, INC, DICK, d/b/a BARRETT-FISHER CO., INC. v. BEACON PRODUCE CO. PACA Docket No. 2-7109. Reparation Order 1296

BELRIDGE PACKING CO. v. BEACON PRODUCE CO. PACA Docket No. 2-7111. Reparation Order 1279

BLUE ANCHOR, INC. v. BEACON PRODUCE CO. PACA Docket No. 2-7106. Reparation Order 1294

BODEGAS RANCHO SAN VALENTINE S. DE R.L. v. OTAY PACKING CO. PACA Docket No. 2-6809. Decision and Order 1358

BRUCE, INC., MIC, a/t/a SINGER'S v. CHIQUITA BRANDS, INC. PACA Docket No. 2-6608. Decision and Order 1215

Stay Order 1375

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont. PAGE

CHECCHI, ALFONSO, *v.* L&J PACKING, INC. PACA Docket No. 2-6813. Order of Dismissal 1364
CHIQUITA BRANDS, INC. *v.* AL NAGELBERG & Co., INC. PACA Docket No. 2-7094. Order of Dismissal 137(
CLARK & MCCORD SALES, INC. *v.* JOSEPH MERCURIO PRODUCE CORP. PACA Docket No. 2-6842. Order of Dismissal 137(
CRISP COUNTY VEGETABLE PACKERS, INC. *v.* DIAMOND-T PRODUCE CORP. PACA Docket No. 2-6631. Decision and Order 1345
D'ARRIGO BROS. CO. OF CALIFORNIA *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7142. Reparation Order 1324
DELAWARE PRODUCE GROWERS, INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7113. Reparation Order 1293
DELIS COMPANY, INC., NICK, *v.* EARLES J. SCHMUCKER and WAYNE A. SCHMUCKER d/b/a SCHMUCKER'S POTATO STORAGE. PACA Docket No. 2-6907. Decision and Order 1307
DELIS COMPANY, INC., NICK, *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7124. Reparation Order 1303
DELIS COMPANY, INC., NICK, *v.* METRO PRODUCE INC. PACA Docket No. 2-6883. Decision and Order 1276
DEW-GRO, INC. a/t/a CENTRAL WEST PRODUCE *v.* SEE SUN HO KEE, INC. PACA Docket No. 2-7114. Order of Dismissal 1366
DEW-GRO, INC. a/t/a WEST PRODUCE *v.* BEACON PRODUCE CO. PACA Docket No. 2-7108. Reparation Order 1292
DONIO, INC., FRANK, *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7148. Order of Dismissal 1380
DYNASTY FARMS, INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7110. Reparation Order 1297
F & J PRODUCE SALES *v.* HRDLICKA DAIRY CATTLE INC. a/t/a HRDLICKA BROS. PRODUCE CO. PACA Docket No. 2-6900. Decision and Order 1342
FINUCANE GILSON & FOSTER, INC. *v.* DEARDORFF-JACKSON COMPANY. PACA Docket No. 2-6831. Decision and Order 1361
FOUR STAR TOMATO, INC. *v.* TOMATOES, INC. PACA Docket No. 2-6834. Decision and Order 128(
FRESH WESTERN MARKETING, INC. *v.* CORGAN & SON, INC. PACA Docket No. 2-6885. Decision and Order 131(
FRUIT MARKETING, INC. *v.* LOFCHIE INC. a/t/a BRUCE CO. PACA Docket No. 2-6857. Decision and Order 126(
G.A.C. PRODUCE CO., INC. *v.* THE OTAY PACKING CO. PACA Docket No. 2-6872, Decision and Order 127
Order on Reconsideration 137
GOLD COAST PACKING, INC. *v.* H. SCHNELL & COMPANY, INC. and/or LLOYD MYERS CO., INC. PACA Docket No. 2-6414. Stay Order 136
GLOBAL BERRY SALES, INC. *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-7047. Order of Dismissal 136
HARDEN FARMS, INC. d/b/a HARDEN FARMS OF CALIFORNIA *v.* C. H. ROBINSON COMPANY. PACA Docket No. 2-7035. Order of Dismissal ... 136

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont.

PAGE

HARLOFF PACKING, INC., ROGER, *v.* JOHN LIVACICH PRODUCE, INC. a/t/a VISTA SALES. PACA Docket No. 2-6829. Decision and Order 1280

JACOBS, HENRY T., *v.* KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC. PACA Docket No. 2-6531. Order Vacating Stay Order, Reopening Proceeding 1371

JEROME COMPANY, LTD., I. R., *v.* CORGAN & SON, INC. PACA Docket No. 2-6861. Decision and Order 1283

LYN-DE FARMS, INC. *v.* MIDWEST PRODUCE BROKERAGE, INC. PACA Docket No. 2-6925. Decision and Order 1289

LYN-DE FARMS, INC. *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-6986. Order of Dismissal 1365

MENDELSON-ZELLER CO., INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7112. Reparation Order 1300

MERRILL FARMS *v.* J. CARUSO PRODUCE, INC. PACA Docket No. 2-6371. Decision and Order 1326

MEYER, ROBERT L., d/b/a MEYER TOMATOES *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7125. Reparation Order 1298

MISSION FRUIT & VEGETABLES DISTRIBUTORS, INC. *v.* CAL-MEX DISTRIBUTORS, INC. PACA Docket No. 2-6772. Order on Reconsideration 1374

NAPLES TOMATO GROWERS, INC. *v.* PETER G. PAPPAS and PHILIP G. PAPPAS d/b/a PETE PAPPAS & SONS. PACA Docket No. 2-6879. Decision and Order 1274

NORTHCROSS, KENT W., d/b/a NORTHCROSS DISTRIBUTING *v.* GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL. PACA Docket No. 2-6824. Decision and Order 1320

O&E GROWERS, INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7150. Reparation Order 1352

ORR, JAMES C., TRUSTEE IN BANKRUPTCY for BRUCE C. LOFCHIE and ANITA J. LOFCHIE d/b/a BRUCE COMPANY *v.* ANTHONY GAGLIANO & CO., INC. PACA Docket No. 2-6985. Order of Dismissal 1377

PANADOL BROS, INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7147. Order of Dismissal 1376

PECOS CANTALOUPES CO., INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7107. Reparation Order 1295

PEMBERTON PRODUCE, INC. *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-7090. Order of Dismissal 1365

PURE GOLD, INC. *v.* VICTOR'S PRODUCE, INC. PACA Docket No. 2-6944. Order Denying Petition for Reopening 1379

SEALD SWEET GROWERS, INC. *v.* CREST FRUIT CO. a/t/a FRANK LEWIS FRUIT CO. PACA Docket No. 2-6949. Order of Dismissal 1369

SIGMA PRODUCE CORP. INC. *v.* HARVEY C. HANSEN d/b/a HARVEY'S. PACA Docket No. 2-6685. Order Granting Petition for Reconsideration and Amending Prior Order 1372

SMITH, THOMAS B., d/b/a THOMAS B. SMITH FARMS *v.* I. M. C. BROKERAGE & PRODUCE CO., INC. PACA Docket No. 2-6777. Decision and Order 1268

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont. PAGE

SONORA RANCHES, INC. *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7143. Reparation Order 1325
STAMOULES, INC., S., d/b/a STAMOULES PRODUCE CO. *v.* SOL SALINS, INC. PACA Docket No. 2-6795. Ruling on Reconsideration 1363
SUNNYSIDE PACKING COMPANY *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7141. Reparation Order 1323
VALENZUELA, THOMAS G., d/b/a T. G. VALENZUELA PRODUCE *v.* TEDDY BERTUCA d/b/a TEDDY BERTUCA COMPANY. PACA Docket No. 2-6710. Decision and Order 1333
WATSONVILLE PRODUCE, INC. *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-7164. Reparation Order 1353
WILLOUGHBY, BARTON, d/b/a WILLOUGHBY FARMS *v.* FRITO-LAY INC. PACA Docket No. 2-6614. Decision and Order 1245
Amendment to Decision and Order 1367
WHIZPAC, INC. *v.* THOMAS COLACE COMPANY. PACA Docket No. 2-7030. Order of Dismissal 1377
WOOD CO.-VISTA, INC., J. A., a/t/a J. A. WOOD CO. *v.* BEACON PRODUCE. PACA Docket No. 2-6860. Decision and Order 1303
WOOD CO.-VISTA, INC., J. A., *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7123. Reparation Order 1302

REPARATION DEFAULT DECISIONS:

A.T.B. DISTRIBUTING CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-296 1390
ACTION PRODUCE *v.* V & A PRODUCE. PACA Docket No. RD-86-267 1385
AMCLO INTERNATIONAL MARKETING 82 INC. *v.* THE JIM FAULKNER CO. INC. PACA Docket No. RD-86-252 1383
AZHDERIAN & CO. INC., V. H., *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-282 1387
BAKER BROKERAGE INC. a/t/a RUDY BROKERAGE CO. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-276 1386
BEEF STAKE TOMATO GROWERS INC. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-291 1389
BONITA PACKING CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-249 1382
BONITA PACKING CO. a/t/a BETTERAVIA FARMS *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-283 1388
BRANCH PACKING CO., J. L., *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-264 1385
BRINGINO, LESLIE J., *v.* JOSE A. GOMEZ d/b/a FUERTE DISTRIBUTORS CO. PACA Docket No. RD-86-278 1386
BUSHMANS' INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-239 1381
CAL MEX DISTRIBUTORS, INC. *v.* P. J. PRODUCE CO. PACA Docket No. RD-86-229. Order Denying Petition for Reopening 1400

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.

PAGE

CARIC, LOUIS J., and STEVEN L. CARIC d/b/a LOUIS CARIC & SONS *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-286..... 1388

CHAPMAN & SONS, INC., KERMIT, *v.* AL NAGELBERG & CO., INC. PACA Docket No. RD-86-219. Order of Dismissal..... 1392

CHIQUITA BRANDS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-287..... 1388

CHIMINO FOODS, INC., JOS., *v.* CONTINENTAL PRODUCE, INC. PACA Docket No. RD-86-227. Order Reopening after Default..... 1397

DANNA & DANNA INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-258..... 1384

DOLE FRESH FRUIT COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-301..... 1391

FINKS CO. INC., SCOTT, *v.* OLYMPIC WHOLESALE PRODUCE & FOODS INC. PACA Docket No. RD-86-299..... 1391

FLANAGAN & JONES, INC. *v.* RUSS ELLIS d/b/a EVERYBODY'S PRODUCE. PACA Docket No. RD-86-243. Order..... 1395

FOUR STAR TOMATO, INC. *v.* REM BROKERAGE CO., INC. PACA Docket No. RD-86-129. Order Reopening after Default..... 1393

GALLOWAY INTERNATIONAL INC., M. L., a/t/a GALLOWAY FARMS INTERNATIONAL *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-268..... 1386

GARIN COMPANY, THE, *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-284..... 1388

GARNAND MARKETING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-285..... 1388

GOLD DIGGER APPLES INC. *v.* JORGE L. RIVAS d/b/a PANCHO'S PRODUCE CO. PACA Docket No. RD-86-290..... 1389

GROWERS MARKETING SERVICE INC. *v.* BUONPASTORE & CO. INC. PACA Docket No. RD-86-277..... 1386

HOMESTEAD TOMATO PACKING CO., INC. *v.* J. V. CAMPISI, INC. PACA Docket No. RD-86-185. Order Reopening after Default..... 1396

INN FOODS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-240..... 1381

J-B DISTRIBUTING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-245..... 1382

JORDAN, JACKIE M., *v.* STEVEN K. CHUNG d/b/a LEE'S MARKET PRODUCE. PACA Docket No. RD-86-297..... 1390

LANGE COMPANY, INC., TOM, *v.* DIXIELAND PRODUCE INC. PACA Docket No. RD-86-256. Ruling on Petition to Reopen, and Default Order..... 1398

LINDEMANN FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-260..... 1384

LINDEMANN FARMS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-248..... 1382

LOS MACHOS FARMS d/b/a BIG RIVER DEVELOPMENT CO. *v.* JOHN E. REYNA. PACA Docket No. RD-86-254..... 1383

LULU PACKING CORPORATION *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-250..... 1382

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont. PAGE

MURPHEY, WILLIAM Y., d/b/a NATIVE AMERICAN FARMS *v.* JOE PINTO & SON. PACA Docket No. RD-86-244 1382
NATURIPE BERRY GROWERS *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-293 1380
NIKADEMOS DISTRIBUTING COMPANY INC. *v.* BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295 1390
PAPPAS & CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD 86-274 1387
PAYETTE VALLEY FRUIT INC. *v.* GILO'S PRODUCE CO. PACA Docket No. RD-86-246 1383
PHELAN & TAYLOR PRODUCE COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-289 1389
PRODUCE PLACE, THE, *v.* THE GUY C. PANNO COMPANY, INC. a/t/a PRODUCE PLUS. PACA Docket No. RD-86-191. Order Reopening after Default 1397
OREGON ONIONS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-259 1384
R & W FARMS INC. *v.* EVERYBODY'S PRODUCE. PACA Docket No. RD 86-202 1386
RAKER & SONS, C., *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD 86-253 1393
REYNOLDS PACKING COMPANY a/t/a M & R COMPANY *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-262 1385
RIO VISTA LIMITED a/t/a GIUMARRA OF ESCONDIDO *v.* LA HACIENDA BRANDS INC. PACA Docket No. RD-86-279 1387
ROBINSON COMPANY, C. H., *v.* ED SCHWARTZ d/b/a ED'S FARMERS MARKET. PACA Docket No. RD-86-192 1396
ROBINSON COMPANY, C. H., *v.* MIKE D. PERKINS d/b/a TRIANGLE PRODUCE. PACA Docket No. RD-86-242 1394
ROYAL FRUIT COMPANY *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-300 1391
SAHARA PACKING COMPANY *v.* WALLA WALLA PRODUCE COMPANY PACA Docket No. RD-86-266 1395
SARGENT PRODUCE COMPANY *v.* BOLER FARMS. PACA Docket No. RD 86-275. Order of Dismissal 1394
SCHNELL & COMPANY, INC., H., *v.* MEDINA FRUITS & VEGETABLES INC PACA Docket No. RD-86-169. Order Reopening after Default 1399
SNOKIST GROWERS *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-298 1392
SPADA DISTRIBUTING CO., INC. *v.* PATELLA & CO., INC. PACA Docket No. RD-86-263. Order Reopening after Default 1400
STAMOULES INC., S., a/t/a STAMOULES PRODUCE CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-292 1388
STEVCO INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-288 1398
SUN VALLEY FOODS INC. *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-251 1401

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont. PAGE

SUN WORLD INTERNATIONAL INC. *v.* KEVIN LYNN LUTHER d/b/a LUTHER PRODUCE. PACA Docket No. RD-86-255 1383
SUN WORLD INTERNATIONAL INC. *v.* SUN FRESH PRODUCE CO. INC. PACA Docket No. RD-86-241 1381
SUNKIST GROWERS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-265 1385
SUNRISE PRODUCE, INC. *v.* RUSS ELLIS d/b/a EVERYBODY'S PRODUCE. PACA Docket No. RD-86-201. Order 1391
TEIXEIRA FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-281 1387
TEIXEIRA FARMS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-257 1384
TEXAS DISTRIBUTING CO. INC. *v.* BEST PRODUCE CO. INC. a/t/a NEW AIRLINE PRODUCE CO. PACA Docket No. RD-86-247 1381
VALERIO'S PRODUCE *v.* F. BOGON COMPANY. PACA Docket No. RD-86-222. Order of Dismissal 1393
VEG-A-MIX *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-280 1387
VENIDA PACKING INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-261 1384

PLANT QUARANTINE ACT

AERO MAYFLOWER TRANSIT COMPANY, INC. P.Q. Docket No. 211. Consent Decision 1406
CHAN, BAO. d/b/a HAWAII TROPICAL PRODUCTS. P.Q. Docket No. 20. Consent Decision 1415
EASTERN AIR LINES, INC., EGBERT HERNANDEZ, JOSE PADIN, and TONY RIVERA. P.Q. Docket No. 216. Consent Decision 1412
GLOBAL VAN LINES. P.Q. Docket No. 241. Consent Decision 1426
HAYNES, HERBERT, and H. C. HAYNES, INC. P.Q. Docket No. 172. Consent Decision 1411
HUDSON, PAULINE ANGELA. P.Q. Docket No. 141. Decision and Order 1424
IBERIA AIRLINES. P.Q. Docket No. 236. Consent Decision 1417
MALONE & HYDE, INC. P.Q. Docket No. 235. Consent Decision 1418
MIRANDA, REBECCA. P.Q. Docket No. 208. Order Dismissing the Complaint 1415
NORIEGA, MANUEL. P.Q. Docket No. 143. Decision and Order 1427
RATON, JOSETTE. P.Q. Docket No. 245. Order Dismissing the Complaint. 1415
SAY, PEGGY. P.Q. Docket No. 178. Consent Decision 1405
SOUTHERN STAR. P.Q. Docket No. 214. Consent Decision 1409
SUPER BROTHERS EXOTIC NURSERY, INC. P.Q. Docket No. 203. Consent Decision 1402
THADDEA NAVIGATION CO., LTD. P.Q. Docket No. 204. Consent Decision 1408
VALLALTA, RENE. P.Q. Docket No. 138. Decision and Order 1421
WESTERN AIRLINES. P.Q. Docket No. 96. Consent Decision 1403
WONG'S PRODUCE. P.Q. Docket No. 205. Consent Decision and Order 1420

COURT DECISION

COUNTY LINE CHEESE COMPANY and MEADOW GOLD DAIRY *v.* JOHN R. BLOCK, SECRETARY, DEPARTMENT OF AGRICULTURE and ASSOCIATED MILK PRODUCERS, INC. Civil Action No. 85 C 1811. (USDA AMA Docket No. M 49-1.) Decision entered June 11, 1986.

Garrett B. Stevens, for defendant.
Sydney Berde, St. Paul, Minnesota, for defendant intervenor.
John H. Vetne, Peterborough, New Hampshire, for plaintiffs (petitioners).
Dorothea A. Baker, Administrative Law Judge.

Donald A. Campbell, Judicial Officer.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Memorandum Opinion and Order entered by Ann Claire Williams, Judge.

MEMORANDUM OPINION AND ORDER

County Line Cheese Company and Meadow Gold Dairy, both divisions of Beatrice Foods Company, brought this action under § 8(c)(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608(c)(15)(B) (1980) (the "Act"), seeking review of a final adjudicatory decision by the Secretary of Agriculture of the United States (the "Secretary"). The Secretary, through his Judicial Officer, dismissed plaintiffs' petition for relief from an audit adjustment which costs plaintiffs $328,003.44. Associated Milk Producers, Inc. ("AMPI") has intervened in this action and asks the court to uphold the Secretary's decision. All parties have moved for summary judgment. For the reasons set forth below, the court affirms the Secretary's decision.

In order to understand the issues in this case, it is necessary to make a brief foray into the byzantine labyrinth of the Agricultural Marketing Agreement Act. As the Supreme Court pointed out in *Zuber* v. *Allen*, 396 U.S. 168 (1969), two peculiar characteristics of the milk industry account for a natural instability in the market:

> [The milk industry has a] basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.
>
> Milk has essentially two end uses: as a fluid staple of daily consumer diet, and as an ingredient in manufactured dairy products such as butter and cheese. Milk used in the consumer market has traditionally commanded a premium

> price, even though it is of no higher quality than milk used for manufacture. While cost differences account for part of the discrepancy in price, they do not explain the entire gap. At the same time the milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months.

Zuber v. *Allen*, 396 U.S. at 172–73.

The Court went on to show that this oversupply was easily exploited by milk distributors, or "handlers." Milk for fluid consumption is highly perishable; it is thus natural that nearby producers should supply the fluid needs of any given market. However, handlers can manipulate the market to their advantage by acquiring milk for fluid use from geographically distant farmers, even paying a higher price than those farmers could get from their ordinary buyers—cheese manufacturing plants. Once these handlers had saturated their local market with milk from distant producers, local farmers were forced to sell their milk for lower-priced manufacturing purposes. With this scenario combined with the seasonal glut periods natural to the industry, farmers had to increase production, and, the Court observed, "the disequilibrium snowballs." *Id.* at 173.

The chaos that resulted from these practices was greatly magnified by a further collapse in prices during the Depression. *Id.* at 174. Congress responded by enacting the Agricultural Marketing Agreement Act. One of the goals of the Act is to allocate among all milk producers the benefits of higher-priced fluid use and the burdens of oversupply. The vehicle for achieving this is the regional milk marketing order which provides for minimum prices which each handler must pay producers for their milk. Since producers receive the same price regardless of the milk's ultimate use, competition for the fluid market is eliminated and farmers can maintain their herds so as to supply the region's dairy needs as a whole. *Id.* at 177–81.

The burden of supplying the fluid market now shifts to the handlers. All handlers pay a uniform minimum price; those who primarily supply fluid needs will therefore reap a windfall; those whose milk will go to manufacturing plants will be overcharged. The Act neutralizes this inequity by authorizing a "producer settlement fund" which is maintained by a Market Administrator. Han-

dlers who distribute primarily fluid (or Class I) products must pay into the fund the difference between the uniform price they paid to producers and the premium Class I price they received on the retail market. Handlers who distribute milk primarily for manufacturing purposes such as cheese (Class II or III) are entitled to draw from the fund the difference between the uniform price they paid the producers and the lower Class II or III price they received. *Id.* at 174–79. Clearly, there are benefits to participating in this pool, and just as clearly, the Secretary, and through him the Market Administrator, must be able to define and monitor the qualifications that producers and handlers must meet in order to participate.

The Indiana Milk Order at issue in this case requires that in order to qualify as a pool supply plant a supply plant must deliver at least 50 percent of its milk to a pool distributing plant. 7 CFR § 1049.7 (1968). The assessments against the plaintiffs resulted from audit adjustments by the Market Administrator who determined that County Line, a supply plant, and Meadow Gold, a distributing plant, had not met the Indiana Order's requirements for pool status. The series of transactions at issue involved shipments by County Line to Meadow Gold. The milk was not needed at Meadow Gold, so it was sent on to a non-pool manufacturing plant owned by County Line. The Market Administrator disqualified these shipments from the pool since the milk, although it entered Meadow Gold's premises, was not "shipped to" Meadow Gold as the Market Administrator construed that term. For a milk shipment to be "shipped to" a plant, said the Market Administrator, it must be pumped into that plant. By disqualifying these shipments, County Line fell below the Indiana Order's 50 percent requirement and lost its pool status. Meadow Gold was forced to re-classify its shipments from County Line as non-pool milk. Plaintiff's Complaint at 5, 6.

Plaintiffs argue that this court should reverse the Secretary's decision because the Market Administrator's construction of 7 CFR § 1049.7(b) is arbitrary and capricious, with no rational relationship to the purposes of the Act. (See, *Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308, 317 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969) for the standard of review which this court must apply). This contention has no merit. The Secretary clearly explained the policy behind the Indiana Order in 33 Fed. Reg. 18,282, 18,288–89 (1968) and 26 Fed. Reg. 67, 69–70 (1961) (both rulemaking decisions are relevant since the 1968 Indiana Order presently in force incorporates by reference the 1961 Decision):

Indiana Order. They will not be permitted to exploit a lacuna in the regulatory scheme which already works in their favor and—quite incredibly—demand that the gap be widened so that they can partake of the benefits of the market pool without associating themselves with the market.

The Decision and Order of the Secretary's Judicial Officer is therefore affirmed.

PROCEEDINGS ON PETITIONS

In re: VALLEY FARMS, INC. AMA Docket No. M 4-22. Decided April 15, 1986.

Handler—books and records, disclosure of information—confidentiality of records—pool plant—milk packaged and distributed not reported—denial of relief requested.

Sanford S. Marateck, Shamokin, PA, for petitioner.
Donald Tracy, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*, hereinafter referred to as the "Act"), instituted by petitioner, a partially regulated handler, subject to federal Milk Order No. 4, hereinafter referred to as "the Order" (7 CFR 1004). The amended petition filed herein on June 6, 1985, challenges the Market Administrator's authority to audit and examine all books and records pertaining to all sales and dispositions of milk by petitioner. The Market Administrator seeks to examine such records to verify petitioner's reports and determine petitioner's obligations under this order.

Respondent, Administrator Agricultural Marketing Service, filed an answer on July 8, 1985.

An oral hearing was held on October 30, 1985, in Philadelphia, Pennsylvania. Petitioner was represented by Sanford Marateck, Esq., Shamokin, Pennsylvania. Respondent was represented by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. At the close of the hearing the time was fixed for the filing of briefs.

PERTINENT STATUTORY AUTHORITY

8d. Books and records; disclosure of information.

(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not

more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office. 7 USCA 608d

Pertinent Order Provisions

Order No. 4

Milk In The Middle Atlantic Marketing Area

7 CFR 1004.1 et seq. (as of Jan. 1, 1985)

§ 1004.7 Pool plant.

(a) A plant from which during the month a volume not less than 40 percent in the months of September through February, and 30 percent in the months of March through August, of its receipts is disposed of as Class I milk (except filled milk) and a volume not less than 15 percent of such receipts is disposed of as route disposition (other than as filled milk) in the marketing area. . . .

§ 1004.8 Nonpool plant.

"Nonpool plant" means a plant other than a pool plant. The following categories of nonpool plants are further defined:

(a) . . .

(b) . . .

(c) "Partially regulated distributing plant" means a plant which is not a pool plant, from which fluid milk products in consumer-type packages or dispenser units are disposed of as route disposition in the marketing area during the month. . .

§ 1004.9 Handler.

* * * * * * *

(a) Any person in his capacity as the operator of:

(1) A pool plant;

(2) A partially regulated distributing plant;

* * * * * * *

§ 1004.30 Reports of receipts and utilization.

(a) On or before the eighth day after the end of each month each handler with respect to each of his pool plants shall report for the month to the Market Administrator in the detail and on forms prescribed by the Market Administrator as follows:

(1) The quantities of skim milk and butter fat contained in:

(i) Receipts of producer milk (including such handler's own duction);

(ii) Receipts of fluid milk products from other pool plants and milk received from a cooperative association for which it is a handler pursuant to § 1004.9(c); and

(iii) Receipts of other source milk;

(2) Inventories of fluid milk products on hand at the beginning and end of the month; and

(3) The utilization of all skim milk and butterfat required to be reported pursuant to this paragraph, showing separately in-area route disposition, except filled milk, and filled milk route disposition in the area;

(b) Each handler who operates a partially regulated distributing plant shall report as required in paragraph (a) of this section, except that receipts of milk from dairy farmers shall be reported in lieu of producer milk; such report shall include a separate statement showing the quantity of reconstituted skim milk in fluid milk products disposed of on routes in the marketing area;

§ 1004.32 Other reports.

(a) Each pool handler shall report to the Market Administrator in detail and on forms prescribed by the Market Administrator as follows:

(1) On or before the 25th day after the end of the month for each pool plant, his producer payroll for such month which shall show for each producer.

(i) His name and address;

(ii) The total pounds of milk received from such producer;

(iii) The average butterfat content of such milk; and

(iv) The net amount of the handler's payment, together with the price paid and the amount and nature of any deduction;

(2) Such other information with respect to receipts and utilization of butterfat and skim milk as the Market Administrator shall prescribe.

(b) . . .

(c) Each handler operating a partially regulated distributing plant who does not elect to make payments pursuant to § 1004.76(b) shall report the same information as required in paragraph (a) of this section with respect to dairy farmers from whom he receives milk.

7 CFR Part 1000—General Provisions, of Federal Marketing Orders

§ 1000.5 Handler responsibility for records and facilities.

Each handler shall maintain and retain records of his operations, and make such records and his facilities available to the Market Administrator. If adequate records of a handler, or of any other persons, that are relevant to the obligation of such handler are not

maintained and made available, any skim milk and butterfat required to be reported by such handler for which adequate records are not available shall not be considered accounted for or established as used in a class other than the highest priced class.

(a) Records to be maintained. (1) Each handler shall maintain records of his operations (including, but not limited to, records of purchases, sales, processing, packaging, and disposition) as are necessary to verify whether such handler has any obligation under the order, and if so, the amount of such obligation. . . .

(2) Each handler shall keep such other specific records as the Market Administrator deems necessary to verify or establish such handler's obligation under the order.

(b) Availability of records and facilities. Each handler shall make available all records pertaining to such handler's operations and all facilities the Market Administrator finds are necessary for such Market Administrator to verify the information required to be reported by the order and/or to ascertain such handler's reporting, monetary or other obligation under the order. . . .

FINDINGS OF FACT

1. Petitioner, Valley Farms, Inc., is a handler of milk as defined in section 1004.9 of the Order.

2. Petitioner's principal place of business is located at 1860 East Third Street, Williamsport, Pennsylvania, where petitioner operates a milk processing plant.

3. The predecessor of the petitioner, Foodcraft, Inc., conducted a partially regulated plant in Sunbury, Pennsylvania, as early as 1974. In 1979, Petitioner came into being as a result of a merger with Foodcraft, Inc., and continues to process its milk as a partially regulated plant.

4. Petitioner markets fluid products in 23 counties of north central Pennsylvania, but only 3 counties, namely, Dauphin, Perry and Juniata, are regulated under the Order.

5. Auditors for the Market Administrator of Order No. 4 sought to examine all of the books and records of the petitioner. At that time petitioner claims it was a party to a rulemaking proceeding involving proposals to redefine Federal Orders No. 2 and No. 4, to regulate areas in which petitioner markets its milk. Petitioner objected to the request to audit for the reason that petitioner believed that information gathered from a dairy becomes public information after an audit and may be used at the rulemaking hearing to petitioner's detriment. It was petitioner's position that the extension of the Order into its area would increase the petitioner's blend price

if the petitioner's entire operation were fully regulated under Order No. 4 and Order No. 2.

6. Petitioner refused to permit the Market Administrator to examine the records he requested until the United States District Court in Pennsylvania ordered petitioner to do so in June 1985. Petitioner had no objection to the examination of its records concerning its sales in the three counties presently regulated under Order No. 4.

7. In 1983 the Secretary of Agriculture conducted a formal rulemaking proceeding to consider amending Orders 4 and 2.

8. The Market Administrator, Order No. 4, took no position on any of the proposals at that proceeding. (Tr. 36)

9. The Secretary did not use or introduce in that proceeding any information traceable in any way to petitioner. (Tr. 36)

10. The general statistical information introduced by the Market Administrator at the rulemaking proceeding is obtained from handlers' reports. (Tr. 40, 41)

11. On the basis of a field survey audit, the Market Administrator discovered that milk packaged by petitioner and distributed in four stores within the marketing area, had not been reported by petitioner. (Tr. 36, 37)

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. The following conclusions are based upon the record evidence and applicable statutory and regulatory provisions enumerated herein.

1. The Act authorizes the Secretary, through his agent the Market Administrator, to examine any records of a handler, such as petitioner, which the Secretary needs to determine the petitioner's obligations under the Order. 7 U.S.C. 608d(1). The Secretary has promulgated regulations to carry out this authority. 7 CFR 1000.5, 1004.30.

2. The Act prohibits the Market Administrator from using specific, identifiable information obtained from a handler in an audit, in a proceeding to amend an Order. 7 U.S.C. 608d(2).

3. The confidentiality of petitioner's records is not violated by the conduct of an audit by the Market Administrator during the pendency of a proceeding to consider amending an order.

4. The relief requested by petitioner should be denied.

DISCUSSION

I

The handler's burden to establish, by way of reports and records, his utilization of milk has been repeatedly affirmed by the Court and Judicial Officer.

> "Thus the system imposes a primary obligation upon all handlers to make complete and accurate reports of their milk purchases and utilization, and a secondary obligation upon such handlers as are disclosed by those reports to be indebted to the Fund to pay the amounts found due. It is obvious that the successful operation of the system depends upon their prompt compliance with these requirements, (1) to make reports from which the administrator obtains the data upon which to base the uniform price and ascertain which handlers shall pay into the Fund and which receive payments therefrom, and (2) to make such payments as are called for by the administrator. . . ." *United States* v. *Turner Dairy Co.*, 162 F.2d 425, 426 (CA 7, 1947), *cert den.* 332 U.S. 836 (1947).

> "The emphasized language of Sec. 927.44 of the Order would seem to place the burden of establishing that the skim milk has been "otherwise utilized or disposed of" on the handler. Only the records of the handler or his consignees will show this. Any endeavor to place this burden on the Market Administrator would be unrealistic, if not futile. . . .

> "Nor is there merit in the contention of the plaintiff that the Market Administrator's ruling places a burden of proof on the handler at a non-pool plant. The burden is categorically placed on the pool plant handler, though the records of the non-pool plant must be relied on to sustain the burden of proving that the skim milk did not ultimately enter the marketing area. That ways and means of evading the prohibition of such entry may be resorted to, does not invalidate the requirement. . . ." *Newark Milk & Cream Co.* v. *Benson*, (D. N.J. 1959) 19 A.D. 54, 57 *aff'd.* 287 F.2d 681, (CA 3. 1961)

> "The order requires the handler to make reports to the Market Administrator showing the milk handled and the classes in which it was used, under the terms of the order. All milk is placed in Class One by the Market Administra-

tor unless proof be furnished by the handler of its use in Class Two. Any arbitrary action of the Market Administrator in rejecting proof of proper classification is reviewable. A similar provision in a milk order was approved in *United States* v. *Ridgeland Creamery Co.*, D.C. 47 F.Supp. 145, loc. cit. 149. The provision as to burden of proof appears to this Court a reasonable and fair method of determining classification of milk. The handler is in possession of all facts and records upon which knowledge as to the use of milk and the grades in which it should be placed, must be based. Why shouldn't the burden be placed in such hands, so that upon the basis of facts showing the use of milk, the handler can furnish the evidence reasonably necessary to the Market Administrator? Under such circumstances, it certainly would be an unusual and awkward regulation to place the burden upon the Market Administrator. Such a provision in the marketing order is a part of the method prescribed by the Administrator for the classification of milk and we find nothing in its terms contrary to the Act." . . . *Bailey Farm Dairy Co., et al* v. *Jones*, 61 F. Supp. 209, 225, (E.D. Mo. 1945), *aff'd* 157 F.2d 87 (CA 8, 1946) *cert den.* 329 U.S. 788.

"Petitioners have another grievance in that they seek Class III-C for some cream that they contend did not come to the International plant but went directly from the 60th Street Station in the City of New York to Country Club and Costa. The auditors and the Market Administrator allowed as Class III-C the cream for which there were supporting tickets or documents showing the direct movement claimed. The auditor was diligent in searching for such documents. Oral testimony either to the Market Administrator or in this proceeding is not an adequate substitute for the keeping of records from which the classification claimed can be verified. *Hogansburg Milk Company, Inc.* v. *Marvin Jones, War Food Administrator,* U. S. District Court, N.D. N.Y., March 16, 1946,* affirming In re Hogansburg Milk Company, Inc., 4 A.D. 285 (1945). . . ." *In re Dellwood Dairy Co., Inc., et al*, 6 A.D. 1107, 1120 (1947).

"Ogden claims first that its reports should have been accepted by the Market Administrator. Section 941.3(b) of the order requires the Market Administrator to "verify" handlers' reports by audit of handler's records. To "verify" means to establish the truth of, or to confirm. It seems ob-

vious that in the absence of supporting records, and in view of the results of the sampling by the Market Administrator Ogden's reported butterfat utilization should not have been accepted . . ." *In re Ogden Dairy Company* 2 A.D. 494 (1943), *aff'd. Ogden Dairy* v. *Wickard* 157 F.2d 445.

II

All Records Of A Regulated Handler Are Subject To Audit

A handler, such as petitioner, must file reports every month detailing, *inter alia*, its distribution and utilization of milk. 7 CFR 1004.30 and 32. From these reports the Market Administrator makes a preliminary determination of the handler's obligations under the order. (Tr. 42) That determination is then adjusted where necessary based on a subsequent audit. (Tr. 43) *In re Hygenic Dairy Company, et al.*, 9 A.D. 693, 700.

The Market Administrator must determine whether a handler operates a fully or partially regulated pool plant. As explained below, he must be able to see records of all of a handler's operations to do this. (Tr. 34)

One of the key elements of the Order is a producer-settlement or equalization fund ("fund"). (7 CFR § 1004.70) Handlers must account to this fund based on their disposition of milk. (7 CFR §§ 1004.71, 72) Because this fund is used to equalize the obligations of all handlers based on their usage of milk and to compensate producers equitably, any handler's inaccurate reporting impacts throughout the order.

A handler which operates a fully regulated plant must account to the fund for all of its Class I and Class II disposition within and outside the Order area, while a handler operating a partially regulated plant need equalize only its in-area Class I disposition. The Market Administrator determines a handler's status, under the terms of the Order, based on the percentage of its Class I disposition that is within the Order area. If 15 percent or more of a handler's Class I disposition is within the Order area, the handler is fully regulated (provided 30 or 40 percent or more of its volume is disposed of as Class I). (7 CFR § 1004.7).

To make such a percentage calculation, the Market Administrator must know the handler's total receipts and disposition, as well as the quantity of in-area and out-of-area disposition. In addition, all of a handler's other obligations under the Order are predicated on an accurate accounting of its sales and other dispositions.

The Market Administrator must be able to examine a variety of records in order to verify a handler's reports. (Tr. 35) Just as the

Internal Revenue Service may need to look at bank records, account ledgers, and many other items to verify a tax return, there are records such as load sheets and accounts receivable that can be used to verify milk reports. The Judicial Officer, in the *Hygenic Dairy* case, *supra* at 700, held: "The extent of the auditing necessary to verify reports is largely a matter of discretion with the Market Administrator. . . ."

Petitioner urges (brief pp. 3-4) that since only 6% to 8% of its total sales and only 3 of 23 counties are covered by Order No. 4, all of the books and records, including the general ledger, should not be made subject to review by the auditors of the Federal Market Administrator. Petitioner contends further that this is especially true when it is a party to a proposal to extend the jurisdiction of either Federal Order No. 4 or No. 2 to all of its operations, "for the reason that such an audit would reveal information that could be used in testimony at hearings that would be adverse to the Petitioner and beneficial to the proponents of the extension of the Order." However, petitioner's argument has no merit, and should not deter the necessary administration of the Order.

Whether or not a handler is fully or partially regulated depends on the *percentage* of its total milk which is distributed within the Order area. The Market Administrator determines this by dividing a handler's total distribution into its in-area distribution. 7 CFR 1004.7(a), 1004.8(c), and 1004.9(a)(2). This cannot be done unless the Market Administrator knows and can verify petitioner's total distribution. Whether a handler is fully or partially regulated depends on all of the information obtained in the audit. The Order provides standards which establish what the Market Administrator must know, *e.g.*, petitioner's total receipts and distribution, while the Act sets out the sort of documentation he may examine.

Petitioner's reliance on the *Lehigh Valley* and *Willow Farmers* cases is unavailing. While *Lehigh Valley* (370 U.S. 76) is a case which dealt with trade barriers and milk pricing; this case involves the Secretary's authority to conduct an audit of a regulated handler's books and records. The *Willow* case (90 F. Supp. 195) involved the question of the adequacy of the records maintained by the handler, and not a refusal to make records available.

In addition, the audit is necessary to verify a handler's obligation to the pool. (Tr. 34, 42) Petitioner admits that at one point it failed to report all of its in-area sales. (Tr. 30) The Market Administrator's testimony is that the only way to uncover such errors in petitioner's reports is to conduct a complete audit. (Tr. 35, 37) Because a business has many potentially corroborative or conflicting

records the Secretary must be able to see all the records, as evidenced by the following exchange:

> Q. How can you verify the information or the reports that you received if you cannot see records relating to all of the sales and receipts of a given handler? (Emphasis added.)
>
> Mr. SHINE: We can't. (Tr. 35)

III

Confidentiality Of The Petitioner's Records

The Secretary conducted a formal rulemaking proceeding pursuant to the Act (7 U.S.C. § 608c(3)(4)) and the Administrative Procedure Act (5 U.S.C. §§ 553, 556). Such proceeding is governed by the Rules of Practice set out in 7 CFR § 900.1-18. There is no connection between the Market Administrator's administration and enforcement of the Order's provisions via an audit and a rulemaking proceeding. The Act prohibits all officers and employees of the Department from releasing any information relating to an individaul handler furnished under section 8d(1) in, *inter alia*, a rulemaking proceeding. Violation of this prohibition is a criminal offense with penalties of up to $1,000 or one year in prison, or both. 7 U.S.C. § 608d(2). Cf: *United States* v. *Levine* 129 F.2d 745 (CA 2, 1942).

The Market Administrator provides only general statistical evidence at a rulemaking proceeding. (Tr. 36) These statistics are not "traceable or identifiable in any way by individual handler." (Tr. 36) Moreover, the statistics are compiled from the handler's monthly reports. (Tr. 41)

Because the statistical information submitted at a rulemaking proceeding is not traceable to an individual handler, the pendency of such a proceeding cannot violate the confidentiality of petitioner's records.

ORDER

The relief requested by petitioner is denied.

This decision and order shall be final and effective 35 days after service upon petitioner unless appealed to the Judicial Officer within 30 days. (7 CFR 900.64(c), 900.65)

Copies hereof shall be served on the parties.

[Decision and Order became final May 23, 1986—Ed.]

DISCIPLINARY DECISIONS

In re: MORGAN OUTLAW, AQ Docket No. 241. Decided May 2, 1986.

Interstate movement infectious animal—Civil Penalty—Consent.

Kevin Thiemann, for complainant.
Michael W. Lonsberry, Monticello, AR, for respondent

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Morgan Outlaw, respondent, violated the Act and regulations promulgated thereunder (7 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Morgan Outlaw, respondent, is an individual whose address is Rt. 1 Box 237, Hamburg, Arkansas 71646.

2. On or about August 4, 1984, the respondent moved one (1) equine infectious anemia reactor horse from Hamburg, Arkansas, to Bastrop, Louisiana.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred fifty dollars ($150.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, 12th and Independence Avenue, S. W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MARGY CANNON, AQ Docket No. 242. Decided May 5, 1986.

Interstate movement of infectious animal—Civil Penalty—Consent.

Kevin Thiemann, for complainant.
Louis B. Jones, Jr., Forrest City, AR, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, 122), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Margy Cannon, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(ç) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Margy Cannon, respondent, is an individual whose address is 836 Riverview #C-20, Jackson, Mississippi 39202.

2. On or about May 21, 1985, the respondent moved one (1) equine infectious anemia reactor horse interstate from Jackson, Mississippi, to Weldon, Arkansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred fifty dollars ($150.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S.W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: LANCE TARVER and TOMMY COLEMAN, AQ Docket No. 221. Decided March 26, 1986.

Brucellosis exposure, no accompanying figures—Civil Penalty—Default.

Fronda Woods, for complainant.
Respondents, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that the respondents violated section 78.8 of the regulations promulgated thereunder (9 CFR § 78.8). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondents.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondents were informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Neither respondent filed an answer during the twenty-day period allowed. Respondents' failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondents' failure to file answers also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). As respondents are deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

Lance Tarver, respondent, is an individual whose address is Route 1, Box 666, Bossier City, Louisiana 71112.

Tommy Coleman, respondent, is an individual whose address is Route 2, Box 180, Marshall, Texas 75671.

On or about May 10, 1984, respondents moved three brucellosis exposed cattle from Bossier City, Louisiana, to Corsicana, Texas,

in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

4. On or about June 20, 1984, respondents moved fifteen brucellosis-exposed cattle from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

5. On or about January 27, 1984, respondents moved at least one brucellosis-exposed cow from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cow was not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

6. On or about May 31, 1984, respondent Tommy Coleman moved four brucellosis-exposed cattle from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

CONCLUSIONS

Respondents have failed to file answers to any of the allegations in the complaint. The consequences of such a failure were explained to the respondents in the complaint and in the letter of service that accompanied it. By their silence respondents have admitted all of the material allegations of fact in the complaint and have waived a hearing.

By reason of the Findings of Fact set forth above, respondents have violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

1. Respondent Lance Tarver is hereby assessed a civil penalty of one thousand five hundred dollars ($1500), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

2. Respondent Tommy Coleman is hereby assessed a civil penalty of two thousand dollars ($2000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Default Decision and Order became final on May 6, 1986, for respondent Lance Tarver, and became final on May 19, 1986, for respondent Tommy Coleman.]

In re: JIM DOSS, RONALD O. EHRLICH and DR. PHILLIP SMITH, D.V.M., AQ Docket No. 136. Decided May 9, 1986.

Interstate movement of animals—Civil Penalty—Consent.

Fronda Woods, for complainant.
Stow Witever, Jr., Greeley, CO, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION FOR RONALD O. EHRLICH

On December 14, 1984, this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint, alleged, *inter alia*, that Ronald O. Ehrlich, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that the proceeding with respect to respondent Ronald O. Ehrlich should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Ronald O. Ehrlich specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the pro-

ceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ronald O. Ehrlich, respondent, is an individual whose address is P.O. Box 60, Milliken, Colorado 80543.

2. On or about June 7, 1984, respondent caused to be moved at least one cow from Abilene, Texas to Milliken, Colorado.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred dollars ($100) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: BONNIE LAMBETH, AQ Docket No. 231. Decided May 14, 1985.

Interstate movement of animals—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Damon Young, Texarkana, AR, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent, Bonnie Lambeth, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be termi-

nated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Bonnie Lambeth, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Bonnie Lambeth, also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bonnie Lambeth, respondent, is an individual whose address is Route 2, Box 436, DeQueen, Arkansas 71832.

2. On or about February 15, 1985, the respondent moved interstate an EIA reactor horse from DeQueen, Arkansas, to Idabel, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: TEXAS LIVESTOCK MARKETING ASSOCIATION, INC., DUDE HARRISON and A. J. LINDSEY, AQ Docket No. 141. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Clement McGovern, for complainant.
Linda Goehman Smith, Fort Smith, TX, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. Section 111 and Section 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Texas Livestock Marketing Association, Inc., A. J. Lindsey and Dude Harrison violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et. seq.*). The respondents and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or basis thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by them in connection with this proceeding.

FINDINGS OF FACT

1. Respondent Texas Livestock Marketing Association, Inc., is a corporation incorporated under the laws of the State of Texas and having its principal place at Union Stock Yards, P. O. Box 1227, San Antonio, Texas 78924.

2. Respondents Dude Harrison and A. J. Lindsey are individuals whose address is Union Stock Yards, P. O. Box 1227, San Antonio, Texas 78294.

3. On or about November 7, 1983, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

4. On or about March 13, 1984, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

5. On or about May 14, 1984, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondents are assessed a civil penalty of six thousand dollars ($6,000.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of the service upon the respondents.

re: JOHNNY DOBSON, AQ Docket No. 251. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Ejiri, for complainant.
dent, *pro se*.

on by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint

filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Johnny Dobson violated the Act and regulations promulgated thereunder (9 CFR Part 78). Respondent Johnny Dobson and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Johnny Dobson admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Johnny Dobson also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Johnny Dobson, respondent, is an individual whose address is Route 6, Box 503, Sulphur Springs, Texas 75482.

2. On or about January 3, 1985, the respondent moved interstate from Paris, Texas, to Omaha, Nebraska, approximately two cattle.

CONCLUSIONS

Respondent Johnny Dobson having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Johnny Dobson is assessed a civil penalty of one hundred fifty dollars ($150.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Depart-

ment of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Order shall become effective upon service of the respondent.

In re: JIMMY HUGHES, AQ Docket No. 253. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Sherrie Kennedy, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the Respondents in connection with this proceeding.

FINDINGS OF FACT

1. Jimmy Hughes, herein referred to as the respondent, is an individual whose address is 206 Robin Way, Mt. Vernon, Texas 75457.

2. On or about May 16, 1985, the respondent moved interstate at least one (1) cow from Giles and Stratton Auction, Inc. in Bossier City, Louisiana, to Paris Livestock Commission Company in Paris, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

1. The Respondent, Jimmy Hughes, is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

2. This order shall become effective on the day upon which service of this Order is made upon the Respondent.

In re: CLARK BUFORD, AQ Docket No. 244. Decided May 23, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act), (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Clark Buford violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). Respondent Clark Buford and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Clark Buford admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies

the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Clark Buford also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Clark Buford, respondent herein, is an individual whose address is Route 3, Box 516, Cordele, Georgia 31015.

2. On or about January 29, 1985, the respondent moved at least 12 cattle from Arabi, Georgia, interstate to Roanoke, Alabama.

CONCLUSIONS

Respondent Clark Buford having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Clark Buford is assessed a civil penalty of one thousand dollars ($1,000.00) which shall be payable to "The Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, on or before May 30, 1986.

This Decision and Order shall become effective on the day it is filed by the Administrative Law Judge with the Hearing Clerk.

In re: ROBERT "BOB" CODY, AQ Docket No. 252. Decided May 29, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111 and § 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Robert "Bob" Cody violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) Respondent Robert "Bob" Cody and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Robert "Bob" Cody admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Robert "Bob" Cody also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Robert "Bob" Cody, respondent herein, is an individual whose mailing address is Route 4, Box 9, Sulphur Springs, Texas 75482

2. On or about December 6, 1984, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately three (3) cattle.

3. On or about December 13, 1984, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately four (4) cattle.

4. On or about January 3, 1985, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately two (2) cattle.

CONCLUSIONS

Respondent Robert "Bob" Cody having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order, in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Robert "Bob" Cody is assessed a civil penalty of seven hundred fifty dollars ($750.00) which shall be payable to the "Treasurer of the United States," by check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: DONALD CONRAD, AQ Docket No. 235. Decided June 3, 1986.

Interstate movement of postparturient cattle—Civil Penalty—Consent.

Clement McGovern, for complainant.
Gene Krekel, Burlington, IA, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the

Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Donald Conrad, herein referred to as the respondent, is an individual whose address is Route 1, West Point, Iowa 52656.

2. On or about June 17, 1985, the respondent moved interstate 11 postparturient cows and 11 calves from Wyaconda, Missouri, to West Point, Iowa.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent is assessed a civil penalty of seven hundred dollars ($700.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GUTMAN BROTHERS, LTD., AQ Docket No. 225. Decided June 17, 1986.

Interstate movement of cattle, no documents—Civil Penalty.

Jaru Ruley, for complainant.
Joseph Nelkin, Baltimore, MD, for respondent.

Decision by Donald A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18 and 78.1 *et seq.*). An initial Decision and Order was issued on March 17, 1986, by Administrative Law Judge Victor W. Palmer (ALJ) assessing civil penalties totalling $2,500.

On April 21, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on June 9, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 71.18 and 78.1 *seq.*), hereinafter referred to as the regulations, in accordance

with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was initiated by a complaint filed on December 23, 1985, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on two separate occasions the respondent transported cattle interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of sections 71.18 and 78.9(a) of the regulations (9 CFR §§ 71.18 and 78.9(a)). On or about April 10, 1984, the respondent moved at least eleven cattle interstate without a certificate or an owner's or shipper's statement, or other acceptable document, containing prescribed information. Then on or about March 20, 1985, the respondent moved nine cattle interstate without proper identification by either Department-approved backtags or Animal and Plant Health Inspection Service-approved eartags and without being accompanied by a certificate or an owner's or shipper's statement, or other acceptable document, containing prescribed information. In his answer, the respondent failed to deny or otherwise respond to any of the material allegations contained in the complaint, thereby, for the purposes of this proceeding, being deemed to have admitted the allegations and waived a hearing. (See 7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Gutman Brothers, Ltd., is a corporation incorporated under the laws of the State of Maryland and having its principal office address at 5905 Simmonds Avenue, Baltimore, Maryland 21215.

2. On or about April 10, 1984, the respondent moved at least eleven cattle, over two years of age, interstate from Hagerstown, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not accompanied interstate by an owner's or shipper's statement, or other acceptable document, containing prescribed information.

3. On or about April 10, 1984, the respondent moved at least eleven cattle, over two years of age, interstate from Hagerstown, Maryland, to Codorus, Pennsylvania, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)) in that the cattle were not accompanied interstate by a certificate, as required.

4. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not accompanied interstate by an owner's or shipper's statement, or other acceptable document, containing prescribed information.

5. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not properly identified by either Department-approved backtags or Animal and Plant Health Inspection Service-approved eartags, as required.

6. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)) in that the cattle were not accompanied interstate by a certificate, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 71.18 and 78.9(a) of the regulations (9 CFR §§ 71.18 and 78.9(a)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to deny or otherwise respond to the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The complaint filed in this case advised respondent that "Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation" (Complaint at 3). In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent enclosed a copy of the rules of practice and expressly advised respondent that failure to "plead specifically to any allegation of the complaint shall constitute an admission of such allegation." The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which

to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Notwithstanding these explicit directions and warnings, respondent filed an answer which states in its entirety: "In reply to your letter of Dec.20.85 we kindly request an oral hearing in the above matter." Accordingly, the ALJ's entry of a default Decision and Order was clearly warranted. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,[2] respondent has shown no basis for setting aside the default decision here.[3] The rationale for the Department's position in this respect is stated in *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986), as follows:

[2] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3] *See In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). Last month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not file a timely answer and did not choose to "set forth any explanation at this time" when his (untimely) answer was filed.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [5] If respondent were permitted to raise the defenses which he explained for the first time on appeal to the Judicial Officer, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to raise these defenses at this time.

[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851–52 (7th Cir. 1962).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, Gutman Brothers, Ltd., is hereby assessed a civil penalty of $2,500 ($500 per violation). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Bldg., United States Depart

ment of Agriculture, Washington, D.C. 20250-1400, within 30 days from the service of this order.

In re: GORDON GIBSON, AQ Docket No. 250. Decided June 17, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Lonnie Turner, Ozark, AR, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Gordon Gibson violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). Gordon Gibson and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth below and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Gordon Gibson admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Gordon Gibson also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Gordon Gibson, respondent, is an individual whose address is Route 1, Box 301, Hartman, Arkansas 72842.

2. On or about October 29, 1984, the respondent moved interstate from Coal Hill, Arkansas, to Moffett, Oklahoma, approximately five cattle.

CONCLUSIONS

Respondent Gordon Gibson having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Gordon Gibson is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to, "The Treasurer of the United States," by certified check or money order and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This Decision and Order shall become effective upon service of the respondent.

In re: BILLY E. ROWAN, AQ Docket No. 187. Decided April 14, 1986.

Interstate shipment of infectious animals—Default—Civil Penalties.

Sally Stratmoen, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on June 25, 1985. The complaint alleged that the respondent violated sections 78.9(d)(3) and 75.4(c) of the regulations (9 CFR §§ 78.9(d)(3) and 75.4(c)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on July 1, 1985. On July 26, 1985, respondent was sent, by regular mail, a notice that his answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the com-

plaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Billy E. Rowan, respondent, is an individual whose mailing address is Route 1, Box 357, New Albany, Mississippi 38652.

2. On or about April 2, 1984, the respondent moved interstate at least one (1) bull from Miller Livestock Company located in Quincy, Louisiana, within a Class C state, to Grenada Livestock Exchange located in Grenada, Mississippi, which moved other than in accordance with the applicable regulations because the bull was not accompanied by a certificate or other document, as required by section 78.9(d)(3) of the regulations. (9 CFR § 78.9(d)(3))

3. On or about June 9, 1984, the respondent shipped two (2) equine infectious anemia reactor horses, named Domino and Casey, from the Lipscomb Brothers Horse Sale located in Como, Mississippi, to the White Horse Sale located in Moulton, Alabama, in violation of section 75.4(c) of the regulations (9 CFR § 75.4(c)) because the horses moved interstate other than to an approved slaughtering establishment for immediate slaughter or to a designated diagnostic or research facility, as required.

rie Kopka Kennedy, U. S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if issued after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal within 30 days to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 17, 1986.—Ed.]

In re: WILLIAM C. FILSINGER, DVM, VA Docket No. 37. Decided May 12, 1986.

Violation of Accreditation Standards—Suspension.

Sherrie Kennedy, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 *et seq.*), by a Complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint was filed with the Hearing Clerk on February 6, 1986. The Complaint alleged that Respondent violated the Standards for Accredited Veterinarians (Standards) (9 CFR § 161.2).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on February 21, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the Complaint, and that failure to file an answer either denying or otherwise responding to the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On March 20, 1986, Respondent was sent, by regular mail, a notice that his Answer had not been received by the Hearing Clerk in the allotted time. More than

twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Dr. William C. Filsinger, respondent, is an individual whose mailing address is Route 5, Box 335A, Cumberland, Maryland 21502.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Maryland under the provisions of the regulations of Title 9, Code of Federal Regulations, Part 160-162.

3. On or about April 14, 1982, April 26, 1983, and May 8, 1984, respondent brucellosis and tuberculosis tested cattle for Deremer Brothers Dairy located in Keyser, West Virginia in violation of paragraph (d) of the Standards (9 CFR § 161.2(d)) because the testing was not done in accordance with instructions issued to the respondent by the Veterinarian in Charge or the State Animal Health Official, or both, which instructions permit such testing only in States in which a veterinarian is accredited.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Standards for Accredited Veterinarians. Therefore, the following Order is issued.

ORDER

Respondent's veterinarian accreditation is hereby suspended for a period of three (3) months, provided that, if the Respondent performs any actions during such suspension for which veterinary accreditation is required, then Respondent's veterinary accreditation shall be revoked. Before such action is taken, Respondent will be afforded an opportunity for a hearing concerning the matter.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Default Decision and Order became final and effective on June 20, 1986—Ed.]

In re: LONGINO HALLEY, SR., AQ Docket No. 258. Decided June 30, 1986.

Fed or permitted feeding of untreated garbage to swine—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Swine Health Protection Act, as amended (Act) (7 U.S.C. § 3801 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Longino Halley, Sr. violated the Act and regulations promulgated thereunder (9 CFR § 166.1 *et seq.*). Longino Halley, Sr. and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Longino Halley, Sr. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Longino Halley, Sr. also waives any action against the United StatesDepartment of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Longino Halley, Sr., respondent, is an individual whose mailing address is 317 Chicago Boulevard, Lake Village, Arkansas 71653.

2. From on or about January 23, 1985, to May 1, 1986, the respondent operated a facility for the treatmet of garbage to be fed to swine.

3. From on or about January 23, 1985, to May 1, 1986, the respondent fed or permitted the feeding of garbage to swine at his facility in Lake Village, Arkansas.

CONCLUSIONS

Respondent Longino Halley, Sr. having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent Longino Halley, Sr. is assessed a civil penalty of two thousand dollars ($2,000.00). However, the civil penalty shall be held in abeyance so long as the,

1. respondent does not operate a facility for the treatment of garbage knowing it is to be fed to swine unless respondent holds a valid permit issued pursuant to the Act; and

2. respondent does not feed or permit the feeding of garbage to swine except in accordance with the Act and regulations promulgated thereunder (9 CFR § 166.1 *et seq.*).

And Provided Further, that if it is determined after an opportunity for hearing, as provided in the Rules of Practice (7 CFR § 1.131 *et seq.*) that any term or provision of the Order has not been, or is not being, complied with, the civil penalty held in abeyance shall be withdrawn and the $2,000.00 shall be due immediately.

This Consent Decision and Order shall become effective on the day of service upon the respondent.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: HORACE R. COX, AQ Docket No. 160. Decided May 1, 1986.

Complaint dismissed.

Robert Broussard, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Horace R. Cox on March 27, 1985, is herewith dismissed.

In re: DOUG SASSEEN, and RANDALL HOOVER, d/b/a OZARKS REGIONAL STOCKYARD, AQ Docket No. 229. Decided May 30, 1986.

Complainant's motion—Dismissed.

Fronda Woods, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed May 23, 1986,

IT IS ORDERED, that the complaint issued in this matter on January 21, 1986, be, and hereby is, dismissed.

DISCIPLINARY DECISIONS

In re: MARLIN U. ZARTMAN, d/b/a GILBERTSVILLE SALES STABLES, AWA Docket No. 292. Decided March 21, 1986.

Failure to maintain adequate program of disease control and veterinary care, evidenced by acceptance of sick animals for sale—Civil Penalty—Cease and desist from accepting sick animals.

Robert Ertman, for complainant.
Dennis L. O'Connell, Gilbertsville, PA, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

The complainant alleges that respondent on two occasions, March 17 and 31, 1984, ". . . failed to maintain an adequate program of disease control and veterinary care, as evidenced by the acceptance of sick animals . . . for sale." Complainant's paragraphs 4 and 5.

On March 17, 1984 respondent had six cats found by complainant's inspectors to be exhibiting clear symptoms of mild contagious illness (something akin to a common cold in a human being, with symptoms of a running nose and eyes).

Then, on March 31, 1984 complainant's inspectors found two rabbits, a cat, a guinea pig, and a dog exhibiting symptoms of minor illness, possible injury, and/or disease. The evidence does not establish any serious condition, disease or injury.[1]

These animals constitute a very tiny fraction of the 280 animals at the auction on March 17, and 398 animals on March 31, 1984.

Further, the symptoms of the illness or injury were sufficiently clear to give fair warning to respondent's employees that the animals were not healthy at time they were accepted earlier that day.

Complainant contends that the acceptance of these animals for sale at the auction constitute violation of a duty to maintain an adequate program of disease control and veterinary care at the auction. (9 CFR 3.10(a), 3.34(a), and 3.59(a). These provisions are identical, but apply to dogs and cats (Subpart A), guinea pigs and hamsters (Subpart B), and rabbits (Subpart C), of Part 3 (Standards)). (9 CFR 3.1)

It is concluded that if respondent had maintained an adequate program for disease control and prevention, his employees would not have accepted these animals.

[1] For example, they range from several sick cats (with pnemonities, a running nose and eyes like a common cold in people), a sick dog, a couple sick rabbits and a guinea pig with sores on its back.

The regulations are not fully satisfied by having a veterinarian inspect the animals shortly before sale. The regulations do not limit respondent's duty to avoid *sale* of sick, diseased, or injured animals, but require respondent to *maintain a program to control and prevent disease from existing or spreading.*

> "Programs of disease control and prevention, euthanasia, and adequate veterinary care shall be established and maintained under the supervision and assistance of a doctor of veterinary medicine." 9 CFR 3.10(a), 3.34(a) and 3.59(a).

Thus, the violations as charged in the complaint are established here.

Prior to the March 17 and 31, 1984 inspections, this respondent had been charged, inter alia, with similar minor violations. *In re Marlin D. Zartman d/b/a, Gilbertsville Sales Stables,* 44 Agric. Dec ___ (1985). (See slip opinion attached to respondent's reply brief, of the *Decision and Order* of the USDA Judicial Officer decision, AWA Docket No. 259, 2/27/85. ("*Zartman I*"). See also *Order Denying Petition for Reconsideration, In re Zartman et al* 44 Agric. Dec. ___ (1985) USDA JO decision, AWA Docket No. 259 filed 4/15/85. A copy of the slip opinion also is attached to Respondent's Reply Brief).

Trial of the issues in *Zartman I* case took place just two months before the March 17 and 31, 1984 inspections made here.

Respondent's counsel contends that the March 17-31 inspections were "retaliatory" in nature, prompted by the apparently successful defense that respondent had raised in *Zartman I, supra.* In fact, this impression proved to be accurate.

Respondent now claims a variety of investigational irregularities or illegalities by complainant's investigators, in particular reference to the March 31, 1984 investigation. These are irrelevant, immaterial and not of much substance, factually or legally, insofar as the merits are concerned—i.e., whether respondent violated the pertinent law and regulations.

Respondent presents a plausible argument in support of his "retaliatory" theory, but it cannot be used to offset a violation, if one exists. What weight or bearing it may have on the departmental sanction policy is not here argued or briefed.

Assuredly, a program of disease control and prevention need not be "perfect" in the sense that it *always* prevents a contagiously sick animal from being accepted at, for example, a busy weekly auction sale. *Zartman I, supra,* slip opinion page 13.

But this is the second such occurrence. Further, these violations happened when respondent and his employees should have been sensitive to the problem, just 60 days after a two day trial of that issue, inter alia.

Therefore, while the incidents of March 17 and 31, 1984 are not flagrant, they are repeated violations.[2]

In additional, respondent again raises here certain legal issues which were raised in *Zartman I* but not resolved at the time of this trial.

The USDA Judicial Officer disposed of those issues in *Zartman I* in a manner that is binding here.

> "At the outset, respondent raises a serious question as to whether the Secretary is authorized to promulgate standards applicable to the operator of an auction sale as to the care, treatment, housing, feeding, watering, and sanitation of animals."

Section 12 of the Act provides (7 U.S.C. § 2142):

> § 2142. *Humane standards and recordkeeping requirements at auction sales*
>
> The Secretary is authorized to promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals, in commerce, by dealers, research facilities, and exhibitors at auction sales and by the operators of such auction sales. The Secretary is also authorized to require the licensing of operators of auction sales where any dogs or cats are sold, in commerce, under such conditions as he may prescribe, and upon payment of such fee as prescribed by the Secretary under section 2153 of this title.

If § 12 of the Act is read by itself, no serious question is presented as the Secretary's authority. That is, the authority given to the Secretary to promulgate humane standards governing the "handling" of animals by operators of auction sales would clearly authorize the standards at the issue here.

[2] The complainant might on occasion issue only a warning to licensee, or, in appropriate circumstances, contingent upon the record of that licensee, issue an formal complaint, as was done here.

In addition, the Secretary is authorized by § 12 of the Act to license the operators of auction sales where dogs or cats are sick "under such conditions as he may prescribe." Dogs and cats are sold at respondent's auction, and the Secretary has prescribed that auction operators must comply with the standards for other animals subject to the Act, as well as dogs and cats (9 CFR § 2.100(a)). That is, one of the conditions the Secretary has prescribed is (9 CFR § 2.100(a)).

> § 2.100. *Compliance with standards.*
>
> (a) Each dealer, exhibitor, operator of auction sales, and research facility shall comply in all respects with the standards set forth in Part 3 of this subchapter setting forth the standards for the humane handling, care, treatment, and transportation of animals . . .

The "standards set forth in Part 3 of this subchapter" are the standards that are involved in this case (9 CFR § 3.1 *et seq.*). Hence, pursuant to the authority in § 12 of the Act, the Secretary has prescribed broad and exacting standards, applicable to all animals subject to the Act, that must be complied with by auction operators.

The legislative history of the Animal Welfare Act of 1970, which added the provisions as to auction operators, states as to § 12 (H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. 11 (1970))

> Section 13.—This section (i.e., § 12 of the Act) would also authorize the Secretary to license the operators of auction sales, where any dogs or cats are sold and such sales are affecting commerce. In addition, the section would extend the recordkeeping and standards of humane handling under the Act to the purchase, handling, and sale of animals, as defined in the bill, rather than only dogs or cats, at auction sales by dealers, research facilities, exhibitors and by the operators of the auction sales.

Hence it would appear from the literal language of § 12 and its legislative history that § 12 gives the Secretary broad authority to impose on auction operators standards of humane handling of all animals subject to the Act.

The ambiguity in this case arises when § 12 of the Act, quoted above, is read in conjunction with § 13 of the Act, which does not expressly apply to auction operators.[2] Section 13 provides (7 U.S.C. § 2143(a)):

> § 2143. *Humane standards for animals transported in commerce*
>
> (a) *Authority of Secretary to promulgate standards*
>
> The Secretary shall promulgate standards to govern the humane *handling, care, treatment,* and transportation of animals by dealers, research facilities, and exhibitors. Such standards shall include minimum requirements with respect to *handling, housing, feeding, water sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, temperatures, adequate veterinary care,* including the appropriate use of anesthetic, analgesic or tranquilizing drugs, when such use would be proper in the opinion of the attending veterinarian of such research facilites, and separation by species when the Secretary finds such separation necessary for the humane handling, care, or treatment of animals. The Secretary shall also promulgate standards to govern the transportation in commerce, and the *handling, care, treatment* in connection therewith, by intermediate handlers, air carriers, or other carriers, of animals consigned by any dealers, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or of any State or local government, for transportation in commerce. The Secretary shall have authority to promulgate such rules and regulations as he determines necessary to assure humane treatment of animals in the course of their transportation in commerce including requirement such as those with respect to *containers, feed, water, rest, venti-*

[2] "As noted by complainant, the Department has consistently construed the term "dealer" to include "auction operators." However, to say the least, some ambiguity arises from the fact that § 12 of the Act applies, inter alia, to "dealers" and "operators of such auction sales," whereas § 13 applies expressly to "dealers," but not the operators of auction sales."

lation, temperature, and handling. (Emphasis added.)

In § 13 of the Act, quoted immediately above, it would appear that the word "handling" is used in a manner that does not include "care," "treatment," "housing," "feeding," "watering," "sanitation," "ventilation," "veterinary care," and "shelter from extremes of weather and temperature." To construe the word "handling" in § 13 of the Act as broad enough to include all of such other terms would make the additional terms in § 13 surplusage. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule tht 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' " [sic] *Ex Parte Public Nat'l Bank of NY,* 8 U.S. 101, 104 (1928).

Nonetheless, this is remedial legislation "to insure that animals . . . are provided humane care and treatment" (7 U.S.C. § 2131(1)), and it has been the settled and contemporaneous construction of the Act by the administrative officials charged with the responsibility for achieving the congressional purpose that the Secretary has authority to impose on auction operators the standards involved in this proceeding. Although the issue is not free from doubt, I believe that the Secretary acted within his statutory authority." *Zartman I, supra* pages 3–7 of slip opinion.

The evidence sustains complainant's allegations that respondent on two occasions in March 1984 failed to maintain an adequate program of disease control and prevention as evidenced by the acceptance of contagiously sick animals in violation of regulations.

Nothing here shows a $600.00 civil penalty ($300 each for the March 17 and March 31, 1984 violations) as inappropriate or unwarranted, when consideration is given to the size of the business, the gravity of the violations, the good faith and history of prior violations, by this respondent.

Reliable, substantial and persuasive evidence establish is that respondent violated the regulations and statute as charged in the complaint.

ORDER

Respondent is assessed a civil penalty of $600.00 dollars ($300 for the March 17 and $300 for the March 31, 1984 violations).

Respondent shall pay this civil penalty by certified check or money order made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Marketing Division, Office of the General Counsel (Attention Robert A. Ertman) United States Department of Agriculture, Washington D.C. 20250.

This civil penalty shall be paid within 90 days from the date this Decision and Order becomes final.

Respondent shall cease and desist from accepting animals showing signs or symptoms of illness, disease or injury, in violation of his duty to establish and maintain a program of disease control and prevention.

This Decision and Order will become final without further proceedings thirty five (35) days after service unless appealed within thirty (30) days after service. (7 CFR 1.140(c) & 1.45(a)).

[Decision and Order became final on May 6, 1986.—Ed.]

In re: STATE UNIVERSITY OF NEW YORK, AWA Docket No. 346. Decided May 12, 1986.

Research facility—construction and maintenance of interior surfaces—proper storage of food and bedding—training program for handlers—Civil Penalty—Consent.

John Griffith, for complainant.
Sanford Levine, for respondent.

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent State University of New York has a mailing address of Office of University Counsel, State University Plaza, Albany, New York 12246.

2. At all material times herein, the respondent operated a research facility subject to and registered under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent State University of New York shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156 and the standards and regulations issued thereunder, 9 CFR §§ 1.1–3.142 and shall cease and desist from any violation thereof. In addition to complying with all other requirements of the Act, regulations and standards, respondent shall within ten (10) days of the effective date of this decision bring its animal care facility into compliance with the standards for the proper construction and maintenance of interior surfaces under 9 CFR § 3.2 and the proper storage of food and bedding under 9 CFR § 3.1.

Respondent shall establish and maintain a training program to assure that all individuals involved in the care and handling of animals or the maintenance of respondent's facility are given adequate training in the proper care and handling of animals and the proper maintenance and sanitation of animal care facilities as required by the Act, regulations and standards.

Respondent shall distribute a copy of this decision to all of its personnel who are responsible for the care and handling of research animals and the maintenance and sanitation of animal care facilities subject to the Act. Respondent shall maintain an ongoing information program to insure that such personnel are aware of the provisions of this decision.

Respondent shall, within thirty (30) days after the effective date of this order, send the Area Veterinarian in Charge a written report setting forth the steps it has taken to implement the requirements of this order.

Respondent is assessed a civil penalty of $1,500.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: LOGAN COLLEGE OF CHIROPRACTIC, AWA Docket No. 345. Decided May 23, 1986.

Research facility—failure to file annual report—Civil Penalty—Consent.

Robert Frisby, for complainant.
Michael P. Casey, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that the respondent violated the Act and the regulations issued pursuant to the Act, 9 CFR §§ 1.1–2.130. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in the complaint and specifically admits that the Secretary has jurisdiction in this matter, admits that it failed to file its annual report for 1984 by the fiscal year by December 1, 1984, but did file the report on December 14, 1984, denies the remaining allegations in the complaint, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Logan College of Chiropractic is a Missouri corporation and its mailing address is 1851 Schoettler Road, Chesterfield, Missouri 63017.

2. At all times material herein, respondent was registered under the Act as a Research Facility (Registration No. 43–32).

3. Respondent failed to file its annual report for the 1984 fiscal year by December 1, 1984, but did file the report on December 14, 1984.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Logan College of Chiropractic shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from failing to file annual reports in a timely manner with the APHIS as required by the Act and the regulations.

Respondent is assessed a civil penalty of $100 payable by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: JIM and MARY FOSTER, d/b/a OAK LEAF KENNELS, AWA Docket No. 371. Decided May 30, 1986.

Dealers—engaged in business without a license—improper storage of food—improper sanitization of facilities—overcrowding—Civil Penalty—Consent.

Howard Haas, Mktg. Div., for complainant.
Mark S. Wasinger, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

The respondents Jim and Mary Foster are individuals doing business as Oak Leaf Kennels at Rt. 1, Montgomery City, MO 63361. The respondents, at all times material herein, were dealers within the meaning of the Act. The respondents, at all times material herein, were not licensed under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Operating in any capacity for which a license is required under the Animal Welfare Act and the regulations issued thereunder without having applied for and obtained a license as required by the Act and the regulations;

(2) Failing to store food in containers for protection against infestation or contamination as required by 9 CFR § 3.1(c);

(3) Failing to ensure that the indoor building surfaces are impervious to moisture and in condition to be readily sanitized as required by 9 CFR § 3.2(d);

(4) Failing to ensure that dogs are not overcrowded in outside cages as required by 9 CFR § 3.4(b)(2); and

(5) Failing to remove excreta from wood slat floors in outside cages, remove trash accumulations, treat wood in outside cages in order to permit adequate cleaning and sanitation, and adequately clean and sanitize indoor wood cages as required by 9 CFR § 3.7.

Respondents are jointly and severally assessed a civil penalty of $250.00 which shall be paid by a certified check or money order payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: RICK STEPHENS, AWA Docket No. 382. Decided June 3, 1986.

Dealer—engaged in business without a license—Civil Penalty--Consent.

Howard Haas, Mktg. Div., for complainant.
Robert Evenson, Pineville, MO, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent willfully violated provisions of the Act and of the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

Respondent Rick Stephens is an individual whose address is Route 1, Rocky Comfort, Missouri. Respondent, at all times material herein, was a dealer within the meaning of the Act. Respondent, at all times material herein, was not licensed.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, his agents and employees, shall cease and desist from violating the provisions of the Animal Welfare Act and the regulations and standards issued thereunder.

Respondent is prohibited for a period of five (5) years from engaging in business in any capacity for which a license is required under the Act. Respondent may apply for a license five years from the effective date of this decision.

Respondent is assessed a civil penalty of $1,000.00 of which $300.00 shall be paid by certified check or money order made payable to the Treasurer of the United States. The remaining $700.00 is hereby suspended and shall be held in abeyance, provided the respondent does not violate any of the provisions of this order within five (5) years from the date this order become effective.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: CITY OF NEW BEDFORD, MASSACHUSETTS, AWA Docket No. 386. Decided June 6, 1986.

Exhibitor—improper housing facilities—Civil Penalty—Consent.

Bradley Flynn, Mktg. Div., for complainant.
Rosalind Poll Brooker, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. The City of New Bedford is a municipality in the State of Massachusetts.

2. The respondent, at all times material herein, was owner and operator of Buttonwood Park Zoo, Post Office Box C-804, New Bedford, Massachusetts 02740.

3. The respondent, at all times material herein, was a licensed exhibitor under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its agents and employees, directly or indirectly through any corporation, trust, or device whatsoever, shall cease and desist from:

1. Failing to house animals in enclosures that are structurally sound and constructed of material of such strength as appropriate for the animal involved;

2. Failing to otherwise maintain its facilities in compliance with section 3.125 of the standards (9. CFR § 3.125 (1986));

3. Failing to maintain any enclosure for marine mammals in a structurally sound condition;

4. Failing to otherwise maintain its marine mammal facilities in compliance with section 3.101 of the standards (9. CFR § 3.101 (1986)).

Respondent is hereby assessed a civil penalty of $1,000. Payment of such penalty is suspended, provided that, within one year of the date this order is entered, respondent spends in addition to the funds already allocated to Buttonwood Park Zoo, $1,000 on the maintenance and upgrading of animal enclosures at Buttonwood Park Zoo. As evidence that such condition is performed, within one year of the date of this order entered, respondent will prepare a report detailing both appropriated and actual expenditures devoted to the maintenance and upgrade of such animal enclosures. Respondent will send this report to the Animal and Plant Health Inspection Service, 424 Trapelo Road, Building 133, Waltham, Massachusetts 02154.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: HENRY HAMPTON, d/b/a HAMPTON ENTERPRISE, AWA Docket No. 372. Decided June 18, 1986.

Dealer—Civil Penalty—Suspension—Consent.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1–3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations contained in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Henry Hampton is an individual doing business as Hampton Enterprise and his address is Route 1, Box 208A, Mount Ulla, North Carolina 28125.

B. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 55–B–69) issued pursuant to the Act.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Henry Hampton shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1–3.142, and shall cease and desist from any

Respondent is assessed a civil penalty of $1,000 to be paid by certified check or money order and made payable to the Treasurer of the United States.

Respondent's license is hereby suspended for fourteen (14) days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: DONALD D. FOSTER, d/b/a WHITE GATE KENNELS, AWA Docket No. 375. Decided June 18, 1986.

Dealer—Civil Penalty—Suspension—Consent.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Donald D. Foster is an individual doing business as White Gate Kennels and his mailing address is Route 3, Box 201A, Macon, Missouri 63552.

2. The respondent, at all times material herein, operated as a dealer within the meaning of the Act and held a Class B license (No. 43-HS) issued pursuant to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Donald D. Foster shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof.

Respondent is hereby assessed a civil penalty of $5,000. Of this amount, $3,000 is to be paid by certified check or money order made payable to the Treasurer of the United States. The remaining $2,000 is suspended provided the respondent complies with the Act and the regulations and standards issued thereunder. If, after notice and hearing, the respondent is found to have violated the Act or the regulations and standards issued thereunder, this $2,000 shall become due and payable by certified check or money order made payable to the Treasurer of the United States.

Respondent's license is suspended for thirty (30) days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: JONI BOOTH, AWA Docket No. 289. Decided May 29, 1986.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

ORDER TO DISMISS

Complainant has moved to dismiss this case.

In support of complainant's motion, complainant has stated that the respondent has surrendered her dealer's license (No. 43 LLT) and no longer operates as a dealer under the Animal Welfare Act.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is ordered that this complaint be dismissed.

In re: GARY QUAS, d/b/a BAMBI PARK, AWA Docket No. 379. Decided June 25, 1986.

Howard Haas, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

ORDER TO DISMISS

Complainant has moved to dismiss this case.

In support of this motion, complainant has stated that respondent is no longer operating the business which gave rise to the charges in this case and has surrendered his license. Under these circumstances the complainant believes that further formal proceedings are unnecessary to achieve the purposes of the Act.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is hereby ordered that this complaint be dismissed without prejudice.

In re: GREEN LAKE MEATS, INC., FMIA Docket No. 89. Decided June 30, 1986.

Harold Reuben, Reg. Div., for complainant.
James L. Quarles, III, Washington, DC, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown in complainant's Motion for Dismissal of Complaint, the complaint that was filed herein against Green Lake Meats, Inc., on May 14, 1985, is herewith dismissed.

DISCIPLINARY DECISIONS

In re: JEFFREY M. RILEY and JOE P. RILEY, P&S Docket No. 6553. Decided May 5, 1986.

Market agency—dealer—misrepresentation of weights—false documentation—faulty scale—Civil Penalty—Prohibited from engaging in business—Consent.

Jory Hochberg, for complainant.
Ernest Van Hooser, Kansas City, MO, for respondent.

Decision by Edward McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Order to Show Cause filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Order to Show Cause and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jeffrey M. Riley and Joe P. Riley, hereinafter referred to as the respondents, are partners doing business as Lexington Sales Company. Respondents' principal place of business is located at Lexington, Tennessee, and their business mailing address is P. O. Box 393, Lexington, Tennessee 38351.

2. The respondents, at all times material herein, were:

(a) Engaged in the business of conducting and operating the Lexington Sales Company stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock on a commission basis at the stockyard;

(c) Engaged in the business of a dealer buying and selling livestock in commerce for their own account; and

(d) Dealers and market agencies within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

(e) Not registered with the Secretary of Agriculture in any capacity subject to the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Jeffrey M. Riley and Joe P. Riley, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Weighing livestock at other than true and correct weights;

2. Preparing or issuing scale tickets, buyers' invoices, accounts of purchase, or any other documents evidencing the purchase or sale of livestock, which show false or incorrect weights for such livestock;

3. Paying the owners or sellers of livestock on the basis of false or incorrect weights; and

4. Failing to maintain and operate their livestock scale in strict conformity with the requirements of section 201.73-1 (INSTRUCTIONS FOR WEIGHING LIVESTOCK) of the regulations (9 CFR § 201.73-1).

Respondent Jeffrey M. Riley is prohibited from engaging in business and operating subject to the Act as a dealer, market agency or stockyard owner for a period of 90 days, and during such time may not register with the Secretary of Agriculture as a market agency or a dealer under the Act.

Respondent Joe P. Riley is prohibited from engaging in business and operating subject to the Act as a dealer, market agency or stockyard owner for a period of 60 days and during such time may not register with the Secretary of Agriculture as a market agency or a dealer under the Act.

Respondents are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

The provisions of this order shall become effective May 1, 1986.

Copies of this decision shall be served on the parties.

In re: LAWRENCE KOEBKE, P&S Docket No. 6603. Decided March 27, 1986.

Dealer—engaging in business without proper bonding—failure to pay full purchase price—Default.

Thomas Heinz, P&S DIV., OGC, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Lawrence Koebke, hereinafter referred to as the respondent, is an individual whose business mailing address is R.R. 1, Traer, Iowa 50675.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified by certified mail on March 13, 1985, that the $60,000.00 surety bond maintained to secure the perform-

ance of his livestock obligations under the Act was being terminated on June 4, 1985. Respondent was further notified on April 22, 1985, that it was necessary for him to file an increased bond in the amount of $65,000.00 and that if he continued his livestock operations under the Act without adequate bond or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without having and maintaining an adequate bond or its equivalent as required by the Act and the regulations.

3. (a) The respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, in connection with his operations as a dealer subject to the Act, purchased livestock in commerce and failed to pay, when due, the full purchase price of such livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Koebke, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations; and

2. Failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of twenty-eight (28) days and thereafter until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty-eight (28) day period.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 *et seq.*).

[Decision and Order became final on May 5, 1986.—Ed.]

In re: RANCHERS AND FARMERS LIVESTOCK AUCTION, INC., and L. KIRBY POWELL, P&S Docket No. 6692. Decided May 5, 1986.

Market agency—dealer—insolvency—custodial account—misuse of funds—suspension—prohibited from operating as dealer or market agency—Consent.

Jory Hochberg, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent named herein does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jursidictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ranchers and Farmers Livestock Auction, Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located at Burlington, Colorado. Its business mailing address is Box 635, Burlington, Colorado 80807.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Ranchers and Farmers Livestock Auction, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis, and as a dealer to buy and sell livestock for its own account.

3. L. Kirby Powell, hereinafter referred to as respondent Powell, is an individual whose business mailing address is Box 635, Burlington, Colorado 80807.

4. Respondent Powell is, and at all times material herein was:

(a) President, manager and a substantial stockholder of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent;

(c) Engaged in the business of conducting and operating the stockyard;

(d) Engaged in the business of selling livestock on a commission basis at the stockyard and buying and selling livestock in commerce for his own account; and

(e) A market agency and a dealer, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, and employees, successors and assigns, and respondent Powell, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Operating as a dealer or market agency while their current liabilities exceed its current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

4. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock; and

5. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

Respondent Ranchers and Farmers Livestock Auction, Inc., is suspended as a registrant under the Act for a period of twenty one (21) days and thereafter until it demonstrates that its current liabilities do not exceed its current assets. When respondent demonstrates that its current liabilities do not exceed its current assets, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the twenty one (21) day period of suspension. Respondents have demonstrated that the deficit in their custodial account has now been eliminated.

Respondent Powell is prohibited from operating as a dealer or a market agency subject to the Act, or from being employed by a dealer or market agency subject to the Act, for a period of 21 days.

The provisions of this order shall become effective May 4, 1986.

Copies of this decision shall be served upon the parties.

In re: CORN STATE MEAT COMPANY, INC.; TERRANCE P. (TERRY) PRINCE, JR.; and JAMES L. WIGGS. P&S Docket No. 6427. Decided May 8, 1986.

Packer—Commercial bribery—Civil penalty.

The Judicial Officer reversed Judge McGrail's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The ALJ's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1979 to 1981, primarily by splitting their profits on resale with three employees of two firms from which respondents bought meat products. Responsible hearsay is admissible in USDA proceedings. Where there are closely held corporations, the disciplinary order can be made applicable to the officers and stockholders who operated the corporation. Commercial bribery violates the P&S Act. Complainant need only prevail by a preponderance of the evidence. The failure of the individual respondents to testify gives rise to the inference that their testimony would have been adverse to their position.

Proof of injury or likelihood of injury is not required in commercial bribery cases. Severe sanction policy explained. The *Bosma* decision, requiring the Department to produce evidence that the penalty will not affect the person's ability to continue to do business, is erroneous, but, in any event, that issue is irrelevant here since respondent corporation is already out of business. In addition, commercial bribery is so inimical to the meat packing industry that a civil penalty for commercial bribery adversely affecting the person's ability to continue in business would be in the public interest.

Thomas C. Heinz, for complainant.
Timothy W. Shuminsky, Sioux City, Iowa, for respondents Corn State and Terrance P. (Terry) Prince, Jr.
Gary E. Wenell, Sioux City, Iowa, for respondent James L. Wiggs.
Edward H. McGrail, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on February 10, 1986, by Administrative Law Judge Edward H. McGrail (ALJ) in which he found that respondents engaged in "commercial bribery" from 1979 to 1981, primarily by splitting their profits on resale with three employees of two firms from which respondents bought meat products. The ALJ ordered respondents to cease and desist from such activities, and respondents were assessed, jointly and severally, a $25,000 civil penalty.

On March 13, 1986, complainant, seeking a $50,000 civil penalty, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On April 4, 1986, respondent Wiggs filed a response in the nature of a cross-appeal, asking that the complaint be dismissed or the penalty suspended. On April 24, 1986, the case was referred to the Judicial Officer for decision.

* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize, except that the civil penalty is increased to $50,000, and the last two sentences of the discussion of page 28 headed "Sanction" (relating to the $25,000 civil penalty) are deleted. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter the "Act", instituted by a complaint and notice of hearing filed on October 10, 1984, by the Packers and Stockyards Administration hereinafter "the complainant". The complaint alleged that the corporate respondent, under the direction, management and control of the individual respondents, made payments to three employees of two meat packing companies for the purpose of inducing and influencing these employees to negotiate purchase and sale contracts favoring the corporate respondent, such payments being made without the knowledge or consent of the companies by whom they were employed. By reason of these facts, the respondents were alleged to have violated sections 202(a) and 202(b) of the Act (7 U.S.C. §§ 192(a), 192(b)).

Respondents filed an answer admitting that the individual respondents were owners, officers and managers of the corporate respondent, that the corporate respondent made some payments to the employees named in the complaint but denying that these payments were made for the purpose of inducing and influencing these employees to negotiate purchase and sale contracts favoring the corporate respondent, and further denying that the payments were made without the knowledge or consent of the employers. Respondents alleged they have not knowingly or intentionally violated the Act.

An oral hearing was held before the undersigned on July 16 and 17, 1985, in Sioux City, Iowa. Respondent Corn State and respondent Terrance P. (Terry) Prince, Jr., were represented by Timothy W. Shuminsky, Esquire, Sioux City, Iowa, and respondent James L. Wiggs, was represented by Gary Wenell, Esquire, Sioux City, Iowa. Complainant was represented by Thomas C. Heinz, Esquire, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. Four witnesses were called to testify by Complainant. Complainant introduced eight exhibits into evidence. Respondents proffered no witnesses or documentary evidence. The parties were

granted leave to file simultaneous briefs on or before August 26, 1985. Such briefs have been filed and duly considered.

STATEMENT OF LAW

Sections 202(a) and 202(b) of the Packers and Stockyards Act (7 U.S.C. § 192(a), 192(b)) provide:

> It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

RESPONDENT COMPANY, AND RELATED COMPANIES

Prior to any discussion of the record, an understanding of the Respondent company, and related companies is necessary.

Corn State Meat Company, Inc. (Corn State)

At all times material herein was engaged in the business of marketing meats, meat food products, or livestock products in unmanufactured form acting as a wholesale broker, dealer or distributor, and hence was a packer within the meaning of the Act. Its place of business was located at 916 Grandview Boulevard, Sioux City, Iowa 51101. (Answer, paragraphs I., 1.(a) and 1.(b)(1)). It occupied approximately 1,000 feet of space at this location which included a lobby area where the bookkeeper was located, three offices and some closet space. Corn State is no longer engaged in business (Tr. 130).[1]

Respondent Prince was the president, vice-president, an owner, manager, director and controller of Corn State. Respondent Wiggs was secretary, treasurer, an owner, manager, director and controller of Corn State (Answer, paragraphs I., 2.(a)(b), I., 3.(a)(b)).

[1] Reference to exhibits are designated "CX" to indicate those submitted by complainant. No exhibits were offered by respondents. References to the hearing transcript are designated "Tr.".

P. & P. Trading Co., Inc. (P&P)

At all times material here was a brokerage house that brokered meat products between dealers and suppliers (Tr. 35). Respondents Wiggs and Prince were the owners and operators of P&P. As of January 30, 1979, it occupied the same office facilities as did Corn State, 916 Grandview Boulevard, Sioux City, Iowa, 51101 and had the same telephone number (CX 5, p. 5; Tr. 39–41, 130).

Country Products, Ltd. (Country Products)

At all times material here was a brokerage house that brokered meat products between dealers and suppliers. The articles of incorporation show that Respondents Wiggs and Prince, and Lee Schroeder were its directors and stockholders. Mr. Schroeder was its sole employee. It, too, occupied the same office facilities as did Corn State and P&P, 916 Grandview Boulevard, Sioux City, Iowa 51101, and had the same telephone number (CX–6, p. 19; Tr. 40–41, 130, 144, 160).

Farmland Foods, Inc. (Farmland) is a packer presently operating plants in Iowa and Nebraska. It is a cooperative owned by its member ranchers and farmers and maintains its headquarters in Kansas City, Missouri (Tr. 61).

Iowa Beef Processors, Inc. (IBP) is a packer with a multi-plant operation headquartered in Dakota City, Nebraska (Tr. 112–113).

DISCUSSION AND CONCLUSIONS

Mr. Merle Paulsen has been employed by the Marketing and Practices Branch, Packers and Stockyards Administration, U.S. Department of Agriculture (P&S) as a marketing specialist and as an auditor for approximately six years. Prior to that he was employed as an auditor by the State of Nebraska, and as an accountant in private industry. His present duties include investigation of trade practice violations under the Packers and Stockyards Act. In the course of his duties he examined the records of Corn State Meat Co., Inc. (Corn State) to determine if that company or any of its employees had committed any such trade practice violations (Tr. 15–16, 127)

His examination of the records of Corn State, which also included records of P&P and Country Products, disclosed checks, general ledger sheets and invoices which contained entries and notes regarding payments made by Corn State to the following individuals:

Robert (Bob) Ingram

Thirteen checks drawn on the account of Corn State between March 14, 1979 and March 6, 1981, were made payable to Robert or Bob Ingram, and endorsed by him. An additional check, number 807, dated October 9, 1979, was made payable to (sic) "R. H. B. for Bob Ingram," in the amount of $2,938.90. It was endorsed by Rufenacht, Bromagen and Hertz, West Point, NE (R.B.H.), a commodity broker, and deposited to its "Customer Segregated Funds Account." Three other checks dated February 12, 1980, April 17, 1980, May 12, 1980 and numbered 1038, 1148, and 1177, respectively, were made payable to the Northwestern National Bank. Two of the checks, numbers 1038 and 1177, were not endorsed while the third of these checks, number 1148, was endorsed by "Ellen Maximona." The majority of the seventeen checks were signed by Respondent Terry Prince and two were signed by Respondent James Wiggs. They totalled $43,012.15 (CX-1; Tr. 17-18, 39, 127-128, 131, 133, 151).

Copies of the general ledger sheets obtained from Corn State, Account No. 74, "Consultant Fees-Brokerage Fees," reflected Robert Ingram as recipient of not only the monies from the thirteen checks endorsed by him, but also of the monies represented by check No. 807 made payable to "R. H. B. for Bob Ingram" and the three checks, nos. 1038, 1148 and 1177, made payable to the Northwestern National Bank (CX-4, p. 1, line 27; p.2, lines 12, 17, 21; Tr. 19-20, 39, 41-43). Each of the checks tabulated by Mr. Paulsen on CX-1, have a corresponding entry on CX-4 by date, name and amount.

Mr. Paulsen testified that he had talked to the bookkeeper at Corn State, Ellen Maximona, who advised him that she cashed all three of the above checks made payable to Northwestern National Bank and turned the money over to Respondents Prince and Wiggs (Tr. 133-134).

Mr. Paulsen, he could not determine whether monies from four of these transactions were actually paid to Robert Ingram.[2] Additionally, the undersigned noted two other transactions amounting to $1,000.00 where it could not be determined whether monies were actually paid to Robert Ingram.[3] Eliminating these six transactions, the total amount of money designated for Robert Ingram by Corn State over this period of approximately one and a half years was $16,181.15 (CX-5, p. 1).

The tabulation for Robert Ingram, CX-5, p. 1, is an index to the transactions which follow on pp. 2-102. For example, CX-5, p. 1, line 1, lists Farmland invoice number 99100 showing a sale to Corn State amounting to $24,090.55. CX-5, p. 2, shows the actual invoice from Farmland, while CX-5, pp. 3-4, show the transaction being handled by P&P, and CX-5, p. 5, shows the final billing by Corn State. It is noted on CX-5, p. 4, that the amount of $500.00 is designated "to Ingram." Similarly, CX-5, p. 1, line 2, lists Farmland invoice number 28030, showing a sale to Corn State amounting to $6,800.00. CX-5, p. 6, shows the actual invoice, while CX-5 pp. 7-8, 10 shows the transaction being handled by P&P, and CX-5, p. 9 shows the eventual billing by Corn State. It is noted on CX-5, pp. 10-11, that $200.00 is designated for "Ingram." Other notations are also found on these invoices, e.g., "4633 Ingram-⅓ of net profit", and "⅓ to Ingram-$3,498.35" (CX-5, pp. 99-100); "Pd. Ing. 1 1d in May" (CX-5, p. 93). In following the above sequence, each line of the tabulation on CX-5 may be traced to the actual invoices and billing on pp. 2-102. Each transaction, with the exceptions of the six transactions, *supra*, contain notations of the various amounts paid to "Ingram" over this period.[4] It is also noted that the invoices of Corn State and P&P are signed alternately by Respondents Wiggs and Prince (CX-5, pp. 9, 41, 46, 48, 54, 55, 63, 68, 72, 81, 85, 89, 94).

Joseph (Joe) T. Sixta

Five checks drawn on the account of Corn State between August 29, 1980 and December 9, 1980, were made payable to, and endorsed by, Joe Sixta. However, one of these

[2] CX-5, p. 1, lines 4, 6, 7, 8 (pp. 17-22; pp. 26-29; pp. 31, 33-36; pp. 32, 37-38).
[3] CX-5, p. 1, lines 16, 19 (pp. 66-69; pp. 79-83).
[4] CX-5, pp. 15, 23, 42, 48, 50, 54, 59, 64, 72, 77, 90, 96, 100.

checks, no. 1460, dated October 24, 1980, was endorsed by Joe Sixta "For Deposit of Lee Schroeder Only". A sixth check, number 1245, dated July 5, 1980, was made payable to, and endorsed by, Lee Schroeder. Three additional checks, numbers 1150, 1199, and 1227, dated April 2, 1980, May 27, 1980, and June 10, 1980 respectively, were made payable to the Northwestern National Bank and were also endorsed by Lee Schroeder. Six of the above nine checks were issued by Respondent Prince, and three were issued by Respondent Wiggs. The checks amounted to a total of $4,207.59 (CX-2).

As with Mr. Ingram, *supra*, Mr. Paulsen testified that each of these checks can be traced to Corn State's general ledger sheets, account number 74, *supra* (CX-4). Notations on the general ledger sheets show that although check numbers 1150, 1199 and 1227 were made payable to the Northwestern National Bank and endorsed by Lee Schroeder, the recipient of the monies from these three checks, $90.00, $100.00 and $100.00 respectively, was Joe Sixta (CX-4, p. 2, lines 18, 23, 24). The general ledger sheets also show that the monies from check number 1245 in the amount of $250.00, made payable to, and endorsed by, Lee Schroeder, and check number 1460 in the amount of $1,428.82, made payable to Joe Sixta and endorsed for deposit by Lee Schroeder, were paid to Joe Sixta (CX-4, p. 2, line 27, p. 3, line 21).

It is noted here that P&S Investigator Skram, *infra*, testified that Mr. Lee Schroeder advised him that he cashed the above checks made out to Northwestern National Bank (numbers 1150, 1199, 1227), and the one made payable to himself (number 1245), and gave the cash to Joe Sixta (Tr. 147-148).

Mr. Paulsen obtained copies of invoices from the records of Corn State which show five sales of products to Corn State by IBP, as well as two purchases from Corn State by IBP. The aggregate of monies designated for Joseph Sixta from the transactions amounts to $2,941.88 (CX-6, p. 1).

The tabulation for Joseph Sixta, CX-6, p. 1, is an index to each of the individual invoices found in CX-6, pp. 2-23. For example, CX-6, p. 1, line 1, lists IBP invoice number 44J04003A, showing a sale to Corn State in the amount of $7,998.00. CX-6, p. 2, shows the actual IBP invoice for this

transaction, while CX–6, p. 3, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $274.93 was designated for "Sixta". Similarly, CX–6, p. 1, line 2, lists IBP invoice number 40J21008B showing a sale to Corn State in the amount of $23,760.00. CX–6, p. 4 shows the actual IBP invoice for this transaction while CX–6, p. 5, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $272.25 was designated for "Sixta". Additionally, CX–6, p. 1, line 3, lists IBP invoice number 40J28009A which, after deduction of an overbilling, amounted to $23,940.00. CX–6, p. 6, shows the overbilling on actual invoices of IBP and Corn State, while CX–6, p. 7, shows the invoice for the resale of these products by Corn State. A notation on this Corn State invoice shows that $745.88 is designated for "Sixta". The total monies designated for "Sixta" on CX–6, pp. 3, 5, 7, amounts to $1,293.06. The two checks issued by Corn State to Joe Sixta, numbers 1350 and 1395 in the amounts of $200.00 and $1,093.06 (CX–6, pp. 8, 9), respectively, total the exact amount designated for "Sixta" on CX–6, pp. 3, 5, 7, $1,293.06. These checks are also tabulated on CX–2, p. 1 and copies included in CX–2, pp. 6, 7. They are also recorded on Corn State's general ledger sheet, account number 74 (CX–4, p. 3, lines 10, 14). It is noted here that Respondent Wiggs issued check number 1350, and Respondent Prince issued check number 1395. Both checks were endorsed by "Joe Sixta".

Finally, there are two other transactions to be noted which trace payments to Joe Sixta through invoices of IBP, Corn State and checks issued by Corn State. The tabulation, CX–6, p. 1, line 4, lists IBP invoice number 40K11012A showing a sale to Corn State in the amount of $23,940.00. CX–6, p. 10, shows the actual IBP invoice while CX–6, p. 11, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $1,428.82 was designated for "Sixta". CX–6, p. 12, is a copy of a Corn State check, number 1460, issued to Joe Sixta by Respondent Prince in the amount of $1,428.82. This check is endorsed by Joe Sixta "For Deposit of Lee Schroeder Only". This is a copy of the same check noted above, no. 1460, and can also be traced to Corn State's account number 74 (CX–2, p. 8; CX–4, p. 3, line 21).

The second of these transactions is a purchase of products by IBP from Corn State. CX-6, p. 1, line 7, lists IBP purchase order number P.O. 95928-S in the amount of $4,385.55. CX-6, p. 6, is a copy of this purchase order showing the IBP agent for the purchase as "Joseph T. Sixta". In this instance, the sale to IBP was initiated through Country Products, Ltd., by Lee Schroeder (CX-6, p. 22). A notation on the Country Products invoice designated "$90.00—Pd.—consultant fee". Check number 1150 in the amount of $90.00, *supra,* was issued by Respondent Prince on the account of Corn State and made payable to Northwestern Bank. As noted previously, it was endorsed and cashed by Lee Schroeder and the money turned over to Joe Sixta (CX-6, p. 23; CX-2, p. 1,2). This check is traceable to Corn State's account number 74, wherein the amount of the check dated April 21, 1980, is designated for "Sixta" (CX-4, p. 2, line 18).

Other notations also appear on Corn State and P&P invoices, e.g., Corn State invoice number 4810 contains the notation "figure Sixta" (CX-6, p. 14). P&P's invoice for the same transaction contains the notation "Sixta gets cut—do not [know] how much until profit figured" (CX-6, p. 16).

Donald (Don) D. Erickson

Three checks drawn on the account of Corn State between August 20, 1980 and October 10, 1980, were made payable to the Northwestern National Bank, numbers 1333, 1356 and 1442. The first check, number 1330, was endorsed by "Bobbie Maximona". The remaining two showed no endorsement. The total of the three checks amounted to $2,500.00 and were issued by Respondent Prince (CX-3).

Mr. Paulsen testified that these checks can also be traced to the general ledger sheets, account number 74, *supra* (CX-4). Although these checks were made out to the Northwestern National Bank, the general ledger sheets show that these monies, $1,000.00, $1,000.00 and $500.00, respectively, were paid to Donald Erickson (CX-4, p. 3, lines 7, 12, 18; Tr. 133-134). Mr. Paulsen further testified that Ellen "Bobbie" Maximona was the office manager and bookkeeper at the Corn State office location.

Mr. Joseph E. Skram has been employed by P&S, USDA, since 1978, first as a Marketing Specialist and for the last four years as a Packer and Poultry Specialist. Prior to 1979, he was a consultant to

several meat packers. He participated with Mr. Paulsen in the investigation of this matter. During the course of the investigation he interviewed Mr. Lee Schroeder who advised him he was an employee of Corn State, a director, an organizer and sole employee of Country Products, but that he had no association with P&P. During the course of the interview, Mr. Schroeder identified three Corn State checks made payable to Northwestern National Bank, and endorsed by him, numbers 1150, 1199, 1227, and one Corn State check made payable to, and endorsed by Lee Schroeder, number 1245, as being checks he cashed and later turned the monies from these checks over to Joe Sixta (CX-2, pp. 2-5; Tr. 143-148, 154-160).

Mr. Skram testified that he also interviewed Ms. "Bobbie" Maximona who he identified as the office manager and bookkeeper at the Corn State office location. Ms. Maximona identified Corn State checks made payable to Northwestern National Bank, numbers 1333, 1356 and 1442, as being checks she cashed and later turned the monies over to Respondents Wiggs and Prince. She explained that she probably endorsed check number 1333 because the bank employee did not recognize her as an employee of Corn State, and did not have to endorse the other two checks, numbers 1356 and 1442, because on those dates the teller did recognize her. She further advised Mr. Skram that the ultimate recipient of the monies from these three checks was Donald Erickson and that she noted his name in the general ledger sheet opposite the dates on which the checks were drawn (CX-3, pp. 2-3; CX-4, p. 3, lines 7, 12, 13; Tr. 149-151, 158-159).

During the course of his investigation Mr. Skram also contacted the office of RB&H at West Point, Nebraska, and determined that they had handled some transactions for Robert Ingram (Tr. 152).

Mr. Steven J. Bernard testified he has held the position of Director of Security, IBP, Inc., Dakota City, Nebraska (IBP) since August 2, 1983. In this position he has access to personnel files of all IBP employees. These files show that Joseph Sixta was employed by IBP as manager-in-charge of variety meats and was responsible for the merchandising of all commodities, except sausage, as well as customer relations. Mr. Bernard worked with Mr. Sixta for a short period of time before Mr. Sixta was terminated from IBP (Tr. 86-87, 94, 114).

Over the years, IBP has had a "Conflict of Interest" policy which was substantially the same as the present one, except that the current one is a little more in depth. The current policy was revised on November 11, 1982, and circulated on January 26, 1983. Personnel files of IBP show that Mr. Sixta had signed a copy of IBP's current

flict of interest policy statement on March 19, 1979, June 28, 1980, and April 2, 1982. This policy prohibits employees from engaging in any activities which could conflict with their duties to IBP, and specifically ". . . prohibits employees from accepting any gifts, loans or other favors from business contacts," as well as, ". . . any activity which might place an employee of IBP under any obligation, or might improperly influence his business judgment, to an outside firm or person who might reasonably expect at a future date to benefit by that obligation." Violation of such policy could result in appropriate disciplinary action, including discharge (CX-8; Tr. 114, 120-123).

Mr. Bernard, together with two other officials of IBP, the executive vice-president and a vice-president who was also legal counsel, were present on the afternoon of October 3, 1983, when Mr. Sixta was questioned by investigators of the Marketing Practices Branch, Packers and Stockyards Administration, United States Department of Agriculture (P&S), Messrs. Merle Paulsen and Joseph E. Skram, concerning alleged improprieties in Mr. Sixta's dealings with the Respondents. Mr. Paulsen presented certain checks to Mr. Sixta and requested an explanation as to why he had received them. As Mr. Bernard recalled, Mr. Sixta acknowledged his signature as the endorser on the checks but was vague in his recollection as to how he happened to receive the monies represented by the checks (Tr. 95-96, 98-99, 112).

Subsequent to this meeting with the P&S investigators, Mr. Sixta met alone with Mr. Bernard and the other two IBP officials. They advised Mr. Sixta that if such allegations were true IBP could not tolerate them since his actions violated IBP's conflict of interest policy. Mr. Sixta finally admitted that one of the checks for $1,000 was an impropriety on his part and did violate IBP's conflict of interest policy. He acknowledged he had endorsed another check for $600.00 which had been issued by Respondent Terry Prince. However, Mr. Sixta advised them that he did not believe the total amount of money Mr. Paulsen alleged he received, $4,882.00, was quite as much as he actually received. He could not recall whether he had received any cash from the Respondents. At the end of the interview with Mr. Bernard and the other IBP officials, Mr. Sixta was discharged because of his violations of the IBP conflict of interest policy, was taken to his office to clear out his belongings, and left the premises that afternoon. Although discharged, personnel records show that Mr. Sixta was allowed to resign effective October 1, 1983 (Tr. 99-100, 107-108).

Mr. Donald Erickson was described by Mr. Bernard as an Assistant Vice President of IBP in charge of boxed beef sales, and having

been employed by IBP since approximately 1972-1973. Following the interviews and the discharge of Mr. Sixta, there was a similar meeting with Mr. Erickson at which Mr. Bernard, the same two IBP officials, and P&S investigators, Messrs. Paulsen and Skram, were present. Mr. Paulsen presented documentation from Corn State records to Mr. Erickson showing three payments Mr. Erickson received from Respondent Terry Prince, two in the amount of $1,000 each, and one in the amount of $500. Mr. Erickson stated that one of the payments for $1,000 was a loan from Respondent Prince. However, he acknowledged that as of the date of the interview, approximately 3 years later, he had not repaid the amount of the loan. As Mr. Bernard recalled, Mr. Erickson showed no further cooperation with the P&S investigators (Tr. 87, 100, 119).

When the two P&S investigators left the room, Mr. Erickson advised Mr. Bernard and the other two IBP officials that he wished to leave the employment of IBP immediately. When pressed for the circumstances surrounding the receipt of payments from Respondents, Mr. Erickson stated that the payments were considerations made to him and he realized he had violated the IBP conflict of interest policy. At this point he advised Mr. Bernard and the other two IBP officials that it would be to his best interest not to discuss the allegations further. Mr. Erickson was discharged from IBP at that meeting; however, his personnel file reflects he was permitted to resign effective October 4, 1983. This file also reflected he signed IBP's conflict of interest policy statement on November 21, 1977, June 28, 1980, and February 3, 1983. The above facts to which Mr. Bernard testified are recorded in a memorandum he drew up on October 10, 1983 (Tr. 87, 100-101, 104, 108, 113, 122-123).

Mr. David L. Poole is the Director of Personnel, Farmland Foods, Inc., Kansas City, Missouri (Farmland), which is engaged in the production and sale of meat products. Mr. Robert Ingram was employed from July 24, 1978 until June 27, 1980, as the sales manager of Farmland's beef products plant at Garden City, Kansas. Mr. Ingram was terminated when the plant closed due to its nonprofitability. Mr. Poole testified that during the period of employment of Mr. Ingram, Farmland always had a conflict of interest policy pertaining to its employees. This policy was set forth in an Employee's Handbook, was updated annually and each time was brought to the attention of its employees. Essentially the policy forbade an employee from engaging in any business which is in competition with the company, and the acceptance of any gifts from any party engaged in dealings of any kind with Farmland, except those of limited value. Until the Packers and Stockyards investigators advised him of the investigation concerning Mr. Ingram, neither he

nor the President of the company were aware of Mr. Ingram receiving any monies from outside sources in regard to his position as sales manager. Nor was he aware of any other executives of the company who were. Had it been known, it would certainly have been cause for terminating his employment with Farmland (CX-9; Tr. 47-57, 65-67, 78).

Mr. W. Wayne MacDonald has held the position of Marketing Specialist, Meat Merchandising Branch, P&S, USDA, for the past seven years and prior to that held the position of Meat Grader with the USDA for approximately nine years. He was present during all of the testimony given at the hearing in this matter. Based on the record, he testified the P&S, USDA, considers the violations charged in this matter as serious since they have an anti-competitive effect on the industry and undermine the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats.

Because of this unwholesome effect, P&S, USDA, seeks a cease and desist order, as well as a civil penalty of fifty thousand dollars ($50,000) to be assessed jointly and severally against the respondents. P&S, USDA, believes the monetary penalty to be appropriate and necessary as it will be an effective deterrent in precluding such activities in the future, not only to the respondents involved here, but also those in similar positions in the meat industry. In reaching this conclusion Mr. MacDonald acknowledges he had not talked with anyone in the industry regarding respondents' activities, but that it was based on the record in this matter and on his long experience in the meat industry. Nor did he contact other like firms in the industry to determine whether they had been affected by the activities of the respondents (Tr. 186-17

also 1 Davidson, *Agricultural Law*, § 3.22 and cases cited therein at fn. 113. The object in an administrative hearing is to obtain all of the relevant facts free from any of the restrictive rules applicable to judicial proceedings. Moreover, responsible hearsay is admissible in USDA administrative proceedings. *In re American Fruit Purveyors, Inc.*, 30 A.D. 1542, 1574 (1971).

A second preliminary matter which must be addressed here is the argument by counsel for Corn State and respondent Prince that respondents Prince and Wiggs are not "packers" as defined by Section 191 of the Act (7 U.S.C. § 191), since from the record it "appears" that they are only employees of Corn State. Accepted by these respondents is the definition of "packer" found in *Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025 (E.D. Pa. 1978), i.e., the company must be closely held ". . . and all officers, jobs, decisions and actions taken are by the same person or persons, . . ." (Shuminsky Brief, pp. 4-5). It is noted here that: 1) respondent's answer admits respondent Prince was the president, vice president, stockholder and manager of Corn State, and that respondent Wiggs was the secretary, treasurer, stockholder and manager of Corn State (Ans. Para I 2(b), 3(b)); 2) respondent Wiggs' Brief acknowledges Terry Prince and James L. Wiggs are Corn State's two owners (Wenell Brief, p. 1) and; 3) unrefuted testimony of record shows respondents Prince and Wiggs as officers and owners (Wiggs-25%, Prince-75%), controlling the operations of Corn State (Tr. 40, 182; see also fn. 4, *supra*). Thus, this argument is totally without merit. It is noted here that Hendrick also stands for the proposition that the corporate device cannot immunize individual defendants from liability once it is found that they are "persons" and "packers" under the P&S Act. *Ibid.* at 1031.

There is no doubt from the record established here that respondents Prince and Wiggs not only owned and controlled Corn State but also P&P, and that they, together with Lee Schroeder, were organizers of Country Products. Further, that meat products were purchased in commerce from Farmland and IBP, as well as sold to IBP. There is also no doubt that Messrs. Ingram, Sixta and Erickson were not brokers or consultants, nor did they perform any legitimate services for Corn State for which they would be entitled to a commission or brokerage fee from Corn State, and certainly not a share of the profit on the resale by Corn State of meat products purchased from Farmland and IBP. It is clear from the records obtained from Corn State that payments were made to Messrs. Ingram, Sixta and Erickson by the respondents, such payments being made in the form of checks and cash to Messrs. Ingram and Sixta, and cash to Mr. Erickson—the cash originating in the form

of checks issued to Northwestern National Bank and endorsed and cashed by Lee Schroeder or Ms. Maximona, employees of Corn State. All checks were drawn on the account of Corn State and signed alternately by respondents Prince and Wiggs. The checks made out to Northwestern National Bank can be traced to Corn State's account no. 74, "Consultant Fees—Brokerage Fees". This is corroborated by statements made to P&S investigators that these checks were cashed and the money turned over to Joe Sixta (Lee Schroeder); that money from the checks was turned over to respondents Prince and Wiggs and notations were made in the general ledger sheets, account no. 74, that the cash was eventually given to Donald Erickson (Ms. Maximona).

The record further shows that the purchases from Farmland and IBP were hand recorded first on P&P invoices but eventually billed to the ultimate customer on Corn State typed invoices, and that both sets of invoices, together with several from Country Products, were entirely obtained from the records of Corn State. Notations on the handwritten invoice copies of P&P show a pattern of payments made on the basis of a percentage of profits made by Corn State on the resale of meat products purchased from Farmland and IBP (Ingram, Sixta), or a rounded dollar amount still based on the amount of profit on each transaction with either Farmland or IBP. In the case of Robert Ingram, the record shows that he was terminated from Farmland when the plant in which he was employed was closed due to its unprofitable operation. It may well be that Mr. Ingram's activities in his dealings with Corn State may have contributed to the demise of this plant. Mr. Ingram was not interviewed by P&S investigators to determine the reason for payments to him by Corn State. However, when the evidence of payments was presented to officials of Farmland, it was their judgment that had these payments been known to Farmland, Robert Ingram would have been discharged from that company because of violation of its conflict of interest policy. As noted previously, the checks and cash which can be connected with checks issued by Corn State and paid to Robert Ingram, amounted to $43,012.15. However, while Corn State's account no. 74 records the check payments to Robert Ingram, it does not record the amounts designated for Robert Ingram found on the invoices obtained from Corn State (CX-5). Thus, considering the $16,181.15 designated for Robert Ingram on these invoices together with the above total from checks and cash, respondents Prince and Wiggs, through Corn State, paid Robert Ingram a total of $59,193.30 over the period January 31, 1979—March 6, 1981 to suborn his fiduciary obligations to Farmland.

With regard to Joseph Sixta, the record has established that the checks and cash payments which can be traced to him through Corn State's account no. 74 amounted to $4,207.59. However, in Mr. Sixta's case, the amounts of three of the checks, nos. 1350, 1395, ($200 + $1,093.06 = $1,293.06) and no. 1460 ($1,428.82) are duplications of the amounts designated for "Sixta" on invoices obtained from Corn State's records (CX-6, p. 1) and recorded in Corn State's account no. 74 (CX-4, p. 3, lines 10, 14, 21). Thus, when the amounts of these checks are deducted from the invoice amounts designated for Joseph Sixta, and the $220 difference is added to the total amount of the checks, the overall amount paid by respondents Prince and Wiggs, through Corn State, to suborn Joseph Sixta's fiduciary obligations to IBP during the period April 21, 1980—December 9, 1980, is $4,427.59. As noted from the interviews with Joseph Sixta, he acknowledged endorsing the checks from Corn State when they were presented to him and admitted that at least one of them was an impropriety that did violate IBP's conflict of interest policy. He also acknowledged other payments from Corn State by stating he did not believe he had received as much as the $4,882.00 alleged to have been received by him. Because he had violated IBP's conflict of interest policy he was discharged by that company but officially allowed to resign from IBP.

Finally, with regard to Donald Erickson, the record shows that three payments, totalling $2,500.00, were made to him by Corn State during the period August 20, 1980–October 10, 1980. Although checks for this amount were made out to Northwestern National Bank, interviews by P&S investigators determined that the cash proceeds from these checks were turned over to respondents Prince and Wiggs, and that this cash was eventually turned over to Donald Erickson and recorded in Corn State's account no. 74. As noted from the interviews with Mr. Erickson, he stated that one payment of $1,000 was a loan from respondent Prince but he acknowledged he had not repaid this loan after an approximate three-year period. He also acknowledged that the payments made to him by Corn State were "considerations" which were violations of IBP's conflict of interest policy. As with Mr. Sixta, Mr. Erickson was also discharged on the spot, but officially allowed to resign from IBP.

What is not clearly demonstrated in this record is the purpose of the payments made by Corn State to the individuals employed by Farmland and IBP. It is clear, however, that the receipt of such payments was not known to the employers of the individuals and certainly Farmland and IBP received no benefit from these payments. Had it been known, they would have been discharged in the

case of Robert Ingram, and discharged sooner in the cases of Joseph Sixta and Donald Erickson. Therefore, it can be only concluded that these payments by respondents Prince and Wiggs were made *sub rosa* for an illegitimate purpose, i.e., influencing these individuals to provide favorable concessions in their dealing with Corn State's purchases. Corn State's inducing or bribing these individuals to obtain favorable concessions for Corn State disadvantages other purchasers competing with Corn State and undermines the sale structure of the sellers. Each of the individuals receiving payments from respondents Prince and Wiggs were in charge of sales for their respective products. Each were open to inducement by respondents to provide favorable terms or prices in their sales to Corn State. In some instances involving Messrs. Ingram and Sixta payments were made on the basis of a percentage of the profit Corn State earned on the resale of the meat products purchased from Farmland and IBP. This is corroborated in the record where it is shown that odd amounts of money, down to the last penny, were paid to Robert Ingram (CX-1, p. 1; CX-5, p. 1) and Joseph Sixta (CX-2, p. 1; CX-6, p. 1). Other round dollar amounts, $200, $500, $1,000, although not a specific percentage of profit earned by Corn State on its resales, appear to be a fixed pattern of fees still based on the amount of profit. For example, $500 was designated for Robert Ingram on profits of Corn State sales ranging from $2,288.85 to $8,160.42 (CX-5, p. 1), while amounts ranging from $90 to $250 were paid to Joesph Sixta (CX-2, p. 1; CX-6, p. 1). It is noted here that, although amounts paid to Donald Erickson can be traced to Corn State's account no. 74, "Consultant Fees-Brokerage Fees", there are no invoices of record to which these payments may be connected. However, they were acknowledged by Mr. Erickson as being "considerations" paid to him by Corn State. Such "considerations" caused him to request termination of his employment with IBP because of the further acknowledgement by Mr. Erickson that he had violated IBP's conflict of interest policy.

From the record as a whole it must be concluded that the payments by respondents Prince and Wiggs to the employees of Farmland and IBP can only be considered commercial bribery, i.e., payments made to employees or agents of buyers or seller, without benefit to their employer, and without the employer's knowledge and consent, in order to induce or hold patronage. *In re National Beef Packing Company*, 36 A.D. 1722, *aff'd* 605 F.2d 167 (10th Cir. 1979). Such activity has long been established as an unfair trade practice by the USDA under Section 202 of the Packers and Stockyards Act (7 U.S.C. § 192), as well as under Section 5 of the Federal Trade Commission Act (FTC Act) (15 U.S.C. § 45). Both Sections of

these Acts were enacted to prevent unfair trade practices in their incipiency because such practices as commercial bribery lack any redeeming value, evince bad business morals, and have a pernicious effect on competition. Anti-competitive practices properly deemed unfair under the FTC Act also reach Section 202 of the P&S Act. *National Beef, supra; In re Gol-Pak Corp.*, 27 A.D. 228, 234 (1968); *In re Hygrade Food Products Corporation*, 26 A.D. 825, 830–831 (1967); *Armour & Co.* v. *United States*, 402 F.2d 712, 722 (7th Cir. 1968); *Standard Distributors* v. *Federal Trade Commission* 211 F2d 7, 13 (1954); *Fashion Originator's Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 463, 466 (1941); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 693 (1948).

Further, unfair trade practices are not confined to those where competitive injury has already resulted, but include those where there is reasonable likelihood that the purpose will be achieved. *DeJong Packing Co.* v. *U.S.D.A.*, 618 F.2d 1329, 1337 (9th Cir. 1980), *cert. denied,* 449 U.S. 1061 (1980). See *Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Wilson & Co.* v. *Benson*, 286 F.2d 891, 895 (7th Cir. 1961); cf. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966). Since Section 202 of the P&S Act is designed to stop unfair trade practices in their incipiency before competitive injury has been suffered, and to reach special mischief and injury in the meat products industry, actual injury need not be shown. *National Beef, supra; Swift & Co., supra; Bruhn's Freezer Meats* v. *U.S.D.A.* 438 F.2d 1332, 1336 (8th Cir. 1971); *Central Coast Meats, Inc.* v. *U.S.D.A.*, 541 F.2d 1325 (9th Cir. 1976); *DeJong Packing, supra; Armour & Co., supra.* The likelihood of competitive injury is present here since the bribery injures the employer by depriving him of the maximum obtainable profits, *Grace* v. *E. J. Kozin*, 538 F.2d 170 (7th Cir. 1976).

Finally, in a recent decision involving Iowa livestock dealers the court stated: "A practice is 'unfair' under § 213(a) if it injures or is likely to injure competition." *Farrow* v. *USDA*, 760 F.2d 211, 214 (8th Cir. 1985). See, also, *In re World Wide Meats, Inc.*, 34 A.D. 71 (1975) (Consent); *In re Vernon Calhoun Packing Co., Inc.*, 34 A.D. 1364 (1975) (Consent).

As is usual in cases of alleged activities to restrain commerce, the Government is without the aid of direct testimony that the defendants entered into any agreement. It is compelled to rely on inferences drawn from their course of conduct as a whole. *Interstate Circuit* v. *United States*, 306 U.S. 208, 221, 59 S Ct., 467, 472 (1939); *National Beef, supra*, at 1735. The inference drawn from all of the evidence of record is that respondents made payments to employees of Farmland and IBP to suborn their fiduciary obligations to these

employers, and thus have violated Sections 202(a) and (b) of the Act.

The further inference that must be drawn is an adverse one to the respondents who were present during the entire oral hearing in this matter but did not take the stand to testify. It must be concluded that their silence raises the inference that had they testified their testimony would have been adverse to their position. See *In re James Grady*, et al. 45 A.D. ___ (January 31, 1986) (Slip Opinion, pp. 65-66); *In re Apex Meat Company*, 44 A.D. ___ (Sept. 5, 1985) (Slip Opinion, pp. 32-33); *In re Mattes Livestock Auction Market, Inc.* 42 A.D. 81, 101-102, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 A.D. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984).

SANCTION

Complainant here seeks a cease and desist order, as well as a civil penalty of fifty thousand dollars ($50,000) to be assessed jointly and severally. Severe sanctions for violations of the Department's regulations has been an established policy. *In re Braxton Worsley*, 33 A.D. 1547, 1556-1571 (1974); see also *In re Donald Hageman, S&H Hogs, Inc.*, et al., 42 A.D. 531, 546 (1983) and cases cited therein. Indeed, as Mr. MacDonald testified, the violations charged, and found, are serious because of their anti-competitive effect on the industry and the undermining of the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats. Mr. MacDonald, representing P&S views, believes that such a large monetary sanction is appropriate and necessary as an effective deterrent in precluding such activities in the industry in the future.

FINDINGS OF FACT

1. (a) Corn State Meat Company, Inc., hereinafter "Corn State," at all times material herein was an Iowa corporation with its principal place of business located at 916 Grandview Boulevard, Sioux City, Iowa 51101.

(b) Corn State at all times material herein was:

(1) Engaged in the business of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer or distributor in commerce; and

(2) A packer, within the meaning and subject to the provisions of the Act.

(c) Corn State is no longer engaged in business.

2. (a) Terrance P. (Terry) Prince, Jr., hereinafter referred to as respondent Prince, is an individual who resides at 134 Cook Drive, Sioux City, Iowa 51103.

(b) Respondent Prince at all times material herein was the president and vice-president and an owner, manager, director and controller of Corn State.

3. (a) James L. Wiggs, hereinafter referred to as respondent Wiggs, is an individual who resides at 2839 Summit Street, Sioux City, Iowa 51104.

(b) Respondent Wiggs at all times material herein was the secretary and treasurer and an owner, manager, director and controller of Corn State.

4. P&P Trading Co. was a brokerage house owned by respondents Prince and Wiggs and located in the same offices occupied by Corn State. Country Products, Ltd., also was a brokerage house which shared the same facilities and which was operated by respondents Prince and Wiggs and Lee Schroeder.

5. Farmland Foods, Inc., hereinafter "Farmland", is a packer headquartered in Kansas City, Missouri.

6. Iowa Beef Processors, Inc., hereinafter "IBP", is a packer headquartered in Dakota City, Nebraska.

7. Robert (Bob) Ingram, is an individual who during the period July 24, 1978, until July 27, 1980, was employed by Farmland as sales manager at Garden City, Kansas. Mr. Ingram was responsible for the sale and marketing of beef products produced by the Garden City plant. He personally handled a number of sales accounts.

8. Joseph L. (Joe) Sixta is an individual who was employed by IBP from prior to March 19, 1979 until October 3, 1984, when he was discharged because of violation of IBP's conflict of interest policy. Officially he was allowed to resign on October 4, 1984. He was the manager in charge of variety meats whose responsibilities included pricing, sales and customer relations.

9. Donald (Don) Erickson is an individual who was employed by IBP from approximately 1972-1973 until October 3, 1984, when he was discharged because of violation of IBP's conflict of interest policy. Officially, he was allowed to resign on October 4, 1984. At the time of his discharge he held the position of vice-president for boxed beef sales. He had certain customers he was responsible for on a daily basis.

10. During the period from at least 1979 up to the present, Farmland has had a policy regarding employee conflicts of interest. That policy states in part:

> No employee shall engage, directly, or indirectly, in any business which is in competition in any area or in any activity with his employer corporation, without the written consent of such employer . . .
>
> No employee shall accept any gift or gifts except those of limited value from any party engaged in dealings of any kind with his employer corporation.
>
> It shall be the duty of every employee to promptly notify his supervisor of any present or future holdings or transactions which may be in violation of the foregoing policy or policies (CX-9, Tr. 53).

This conflict of interest policy is communicated to new employees when first hired and is brought to the attention of employees annually.

11. During the period from March 19, 1979, up to the present, IBP has had a policy regarding employee conflicts of interest. The January 26, 1983, written version of that policy states in part:

> It is the policy of IBP not only to avoid any practice that might be detrimental to the corporation's interest, but also to avoid actions or practices that might be so construed. Any employee who believes that any practice in which he is engaged, or of which he is aware, may be so construed should immediately report it to his supervisor and to the Legal Division.
>
> This policy prohibits employees from accepting any gifts, loans, (other than from established lending institutions), or other favors from business contacts. It also prohibits the acceptance of entertainment (during or after business hours), business lunches and dinners, except when specifically believed beneficial to the Company and on the provision that they be reciprocated on the next appropriate occasion. It further prohibits any other activity which might place an employee of IBP under obligation, or might improperly influence his business judgment, to an outside firm or person who might reasonably expect at a future date to benefit by that obligation (CX-8, p. 4).

This conflict of interest policy was communicated periodically to all upper-level IBP employees, and specifically to Mr. Sixta and Mr. Erickson on various occasions between 1979 and 1983. Both men signed compliance statements acknowledging receipt.

12. During the period January 31, 1979, through March 6, 1981, a total of $59,193.30 in checks and cash was paid by respondents Prince and Wiggs to Robert Ingram. On three occasions, payments were first converted to cash by Ellen "Bobbie" Maximona, the Corn State bookkeeper, who then gave the cash to her employers, respondents Prince and Wiggs, and then made notations in Corn State's account number 74 that such cash payments were given to Robert Ingram.

13. During the period April 21, 1980, through December 9, 1980, a total of $4,427.59 in checks and cash was paid by respondents Prince and Wiggs to Joseph Sixta. On four occasions, the payments were channeled through Lee Schroeder, an employee of respondents. Mr. Sixta acknowledged receiving money from respondents.

14. During the period August 20, 1980, through October 10, 1980, respondents Prince and Wiggs made three payments totaling $2,500.00 to or for the benefit of Donald Erickson.

15. Respondents accounted for these payments to or for the benefit of Robert Ingram, Joseph Sixta and Donald Erickson in their account number 74, titled, "Consultant Fees, Brokerage Fees" (CX-4). There is no credible evidence Mr. Ingram, Mr. Sixta or Mr. Erickson rendered consulting, brokerage or any other legitimate services to respondents.

16. The payments made to Ingram were in fact a designated portion of the profits generated by the Corn State resale of products purchased by Corn State from Farmland. In some instances it appears Ingram got ⅓ of the profits. In other instances, the payments apparently were calculated as an arbitrary portion of the profits, usually $500.00 per load.

17. The payments made to Sixta were in fact a designated portion of the profits generated either by the Corn State resale of IBP products or by the Corn State sale of products to IBP. In most instances the payments apparently were calculated as an arbitrary portion of the profits.

18. Robert Ingram violated Farmland's conflict of interest policy by sharing the profits generated by the Corn State resale of meat products purchased from Farmland. If Mr. Ingram had provided paid consulting services to Corn State (and there is no evidence that he did), that also would have violated Farmland's conflict of interest policy. The executive management of Farmland was unaware Ingram was receiving money from Corn State. If management had been so aware, Ingram's receipt of money from Corn State would have been cause to terminate his employment.

19. Joseph Sixta violated IBP'S conflict of interest policy by sharing in the profits generated by the Corn State resale of meat prod-

ucts purchased from IBP and the Corn State sale of products to IBP. On October 3, 1984, when Mr. Sixta admitted to IBP management that he had violated his employer's conflict of interest policy, he was immediately fired.

20. On October 3, 1984, Donald Erickson admitted to IBP management that he had violated IBP's conflict of interest policy by receiving money from Corn State, a customer and a supplier of IBP, in return for unspecified "considerations". His employment was immediately terminated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

I. The ALJ's Findings and Inferences Are Supported by the Record.

Respondent Wiggs, the only respondent who filed a response to complainant's appeal, argues that the evidence does not support the ALJ's findings of fact [5] because unreliable hearsay was admitted, and there is no evidence that the payments were made for the purposes of bribery. However, as the ALJ correctly noted (slip op. at 18-19), responsible hearsay is freely admitted in our Department's administrative proceedings, and the hearsay admitted here was of the sort upon which responsible persons are accustomed to rely. Furthermore, even without the hearsay evidence, the record contains adequate documentary evidence and admissions to support the ALJ's inference that the payments were made "*sub rosa* for an illegitimate purpose, i.e., influencing these individuals to provide favorable concessions in their dealing with Corn State's purchases" (slip op. at 24).

In addition, neither respondent Wiggs nor respondent Prince testified in this proceeding, notwithstanding the fact that both individual respondents were present during the entire hearing (Tr. 5, 191-92). Under the settled principle that has been followed in many proceedings before this Department,[6] and which has been

[5] Complainant need only prevail by a preponderance of the evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[6] *E.g.*, *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric. Dec. ____ (Feb. 27, 1986); *In re Grady*, 45 Agric. Dec. ____ (Jan. 31, 1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. ____ (Oct. 17, 1985); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985) (decision on remand); *In re Petty*, 43 Agric. Dec. ____ (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits

Continued

followed in many judicial proceedings,[7] I infer that their testimony would have been adverse to their interests here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch* v. *Archer,* Cowp. 66, quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

II. Proof of Injury or Likelihood of Injury Is Not Required in Commercial Bribery Cases.

Respondent Wiggs argues (Appeal Response at 10):

affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[7] 2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States* v. *Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-27 (1939); *Kirby* v. *Tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc.* v. *Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union* v. *NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 142, 148-49 (3d Cir. 1965); *Cromling* v. *Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles* v. *Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co.* v. *Ratcliff*, 108 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

The complainant failed to produce the evidence required by *Central Coast Meats, Inc.* v. *U.S. Department of Agriculture*, 541 F.2d 1325 (1976-9th Cir.) and *Corona Livestock* v. *U.S. Department of Agriculture*, 607 F.2d 811 (1979-9th Cir.) to support the sanctions they have requested.

Presumably respondent Wiggs is arguing that the Department failed to prove that the commercial bribery involved here was likely to cause injury.

However, W. Wayne MacDonald, a marketing specialist in the Meat Merchandising Branch of the Packers and Stockyards Administration, with 25 years experience in the meat business (Tr. 173), testified as an expert witness that the commercial bribery involved here would have an anti-competitive effect on the industry and would undermine the trust that the two meat suppliers to respondents (Farmland and IBP) had in their employees (Tr. 166-88). Furthermore, as stated above, the record supports the ALJ's inference that the payments to the employees of IBP and Farmland were made for an illegitimate purpose to influence these individuals to provide favorable concessions in their dealing with respondents. Nonetheless, as shown below, in commercial bribery cases the Department does not have to prove injury or likelihood of injury.

Since the broad terms "unfair," "unjustly discriminatory," and "deceptive" used in §§ 202(a) and 312(a) of the Act are not defined, "their meaning must be determined by the facts of each case within the purposes of the Packers and Stockyards Act." [8] The terms are not so vague or uncertain, however, as to be an unconstitutional delegation of legislative authority.[9]

The Secretary "has broad powers under Section 202(a) with regard to trade practices which are 'unfair' in that they conflict with the basic policies of the various antitrust statutes, even though the practices may not actually violate those statutes." [10] "Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the

[8] *Capital Packing Co.* v. *United States*, 350 F.2d 67, 76 (10th Cir. 1965). Cases under § 202 of the Act are discussed in Annot. 5 A.L.R. Fed. 729 (1970).

[9] *Farmers Livestock Comm'n Co.* v. *United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (3-judge ct.); *O.V. Handy Bros. Co.* v. *Wallace*, 16 F. Supp. 662, 664-66 (E.D. Pa. 1936); and *see United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932).

[10] *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968); and *see DeJong Packing Co.* v. *USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits aff'd; suspension order rev'd); *cf. FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394, 396 (1953) (construing "unfair" method of competition under FTC Act).

Federal Trade Commission (15 U.S.C. § 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic." [11]

The use of adjectival qualifications such as "unjustly" and "undue" "enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b)." [12]

It has been held that in construing these terms, substantial weight must be given to whether the business activities were carried on "in good faith by normally fair methods not 'heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression.'" [13]

Specifically, it is well settled that commercial bribery is an unfair, unjustly discriminatory, and deceptive practice which is violative not only of § 202(a) of the Packers and Stockyards Act, but also the Robinson-Patman amendments to the Clayton Act (15 U.S.C. § 13(c)), and it is an unfair practice under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45).[14] As stated in *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1977), *aff'd*, 605 F.2d 1167, 1168-69 (10th Cir. 1979):

> Commercial bribery is the "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).
>
> The practice has been held violative of the Robinson-Patman amendments to the Clayton Act (15 U.S.C. § 13(c)), *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), and it has been recognized as an unfair trade practice under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45), where it is ap-

[11] *Armour & Co.* v. *United States*, 402 F.2d 712, 722 (7th Cir. 1968). *Accord*, *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits aff'd; suspension order rev'd).

[12] *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968).

[13] *Swift & Co.* v. *Wallace*, 105 F.2d 848, 856 (7th Cir. 1939).

[14] *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-36 (1977), *aff'd*, 605 F.2d 1167, 1168-69 (10th Cir. 1979); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 552-53 (1981); *In re Gol-Pak Corp.*, 27 Agric. Dec. 228, 232-35 (1968); *In re Hygrade Food Prods. Corp.*, 26 Agric. Dec. 825, 829-32 (1967).

plied to secret gifts or payments by sellers to employees or agents to induce them to promote purchases of the sellers' product by the employer of the agent or employee. *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939). Numerous administrative proceedings have been initiated against the practice by the Federal Trade Commission, resulting in orders prohibiting it. 2 CCH *Trade Regulation Reporter*, ¶ 7,903.

Likewise, the Packers and Stockyards Administration considers the practice an unfair and deceptive one. Consent and default cease and desist orders have been entered against commercial bribery and related practices. See, *e.g.*, *In re Dold Packing Co.*, 33 A.D. 775 (1974); *In re Robel Beef Packers, Inc.*, 31 A.D. 516 (1972); *In re Ed. Miniat, Inc.*, 28 A.D. 601 (1969); *In re Swift and Company*, 26 A.D. 638 (1967); *In re Hebron Packing Co., Inc.*, 25 A.D. 1006 (1966); *In re Marhoefer Packing Co.*, 25 A.D. 739 (1966); *In re South Chicago Packing Co.*, 20 A.D. 844 (1961). Decisions granting a cease and desist order have also been issued after administrative hearings in *In re Gol-Pak Corporation*, 27 A.D. 228 (1968), and in *In re Hygrade Food Products Corporation*, 26 A.D. 825 (1967).

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> '. . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. 'No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

The erosive effect was succinctly described by a Packers and Stockyards Administration witness:

> It seems to me that the person making the bribe has kind of the inside track on the business and can exclude competitors because of this relationship with the buyer . . . [P]rice and quality will frequently take a lesser place in making the buying decision when there is consideration of a bribe or gift of some sort. (Tr. 105).

Since commercial bribery is inherently unfair, unjustly discriminatory and deceptive, it is not necessary to show in a particular case that the commercial bribery involved caused injury or was likely to cause injury.

The Department has consistently taken the position that in order to prove that *any* practice is "unfair" under §§ 202(a) (7 U.S.C. § 192(a)) or 312(a) (7 U.S.C. § 213(a)) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury.[15]

A contrary view has been expressed in only a few, atypical cases (four from the Ninth Circuit). In *Armour & Co.* v. *United States*, 402 F.2d 712, 717-23 (7th Cir. 1968), involving coupon rebates to ultimate consumers on bacon packages, the Seventh Circuit held that the evidence must show either predatory intent or that the coupon practice was likely to result in injury to competition to be in violation of § 202(a).

In *Central Coast Meats, Inc.* v. *USDA*, 541 F.2d 1325, 1327 (9th Cir. 1976) (2-1 decision), in which the Department contended that a packer engaged in an "unfair" practice by being a packer and a dealer, the Ninth Circuit questioned the Secretary's argument that "actual injury need not be shown and that § 202(a) may be used to uproot unfair practices in their incipiency." The court held that

[15] *E.g.*, *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final order*, 44 Agric. Dec. ____ (Oct. 24, 1985) (consent cease and desist order and $10,000 civil penalty); *In re Walti, Schilling & Co.*, 39 Agric. Dec. 119, 149-50 (1978); *In re Hines*, 35 Agric. Dec. 113, 123-24 (1976); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 161-76 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); and *see Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman* v. *USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *Wilson & Co.* v. *Benson*, 286 F.2d 891, 895 (7th Cir. 1961); *Hyatt* v. *United States*, 276 F.2d 308, 312 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *cf. FTC* v. *Texaco, Inc.*, 393 U.S. 223, 225-26 (1968); *FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1953); and *Corn Prods. Refining Co.* v. *FTC*, 324 U.S. 726, 738 (1945) (the last three cases involve incipiency doctrine under FTC Act).

"the Secretary must show that the conduct in question [packer-dealing] is likely to produce the sort of injury the Act is designed to prevent" (*id.*).

In *Corona Livestock Auction, Inc.* v. *USDA*, 607 F.2d 811, 814 (9th Cir. 1979), in which the Department contended that a unique method of conducting a livestock sale was "unfair" because livestock buyers present at the sale were not permitted to bid on livestock, but could only accept or reject a predetermined price set by the salesman, who rotated the opportunity to accept or reject the price among the potential buyers, the Ninth Circuit repeated that the *Central Coast* case requires the agency to establish that a particular practice is "likely to produce the sort of injury the Act is designed to prevent."

In *DeJong Packing Co.* v. *USDA*, 618 F.2d 1329, 1336-37 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980), in affirming the Department's position that a group boycott of a livestock auction market by meat packers was an "unfair" practice, the Ninth Circuit held that the agency must show a "reasonable likelihood" of an undue restraint of competition.[16]

The Department does not agree with the decisions in the *Central Coast, Corona,* and *Armour* cases,[17] and adheres to its consistent policy set forth above.

In *Bosma* v. *USDA*, 754 F.2d 804, 808 (9th Cir. 1984), the court quoted its *Central Coast Meats, Inc.* holding that the Department must show that the challenged conduct "is likely to produce the sort of injury the Act is designed to prevent." The court found that actual harm resulted when an auction operator purchased livestock from consignments for speculation. *Id.* 808-09. However, notwithstanding its holding that proof of a likelihood of injury was necessary as to that particular type of violation, the court also held in the same case that the failure of the auction operator to inform

[16] In *Swift & Co.* v. *United States*, 317 F.2d 53, 56 (7th Cir. 1963), the Judicial Officer had held that proof of injury to competition, as required by § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was unnecessary to establish a violation of § 202(a) of the Packers and Stockyard Act. The court, however, did not decide whether that conclusion is correct "since it found that the point is academic" (*id.*).

[17] *See In re ITT Continental Baking Co.*, 44 Agric. Dec. ___ (Mar. 18, 1985), *final order*, 44 Agric. Dec. ___ (Oct. 24, 1985) (consent cease and desist order and $10,000 civil penalty); *Western Iowa Farms Co.* v. *Sioux City Stock Yards*, 38 Agric. Dec. 1296, 1322 n.12 (1979), *aff'd*, 629 F.2d 502 (8th Cir. 1980) (2-1 decision); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1602 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 171-77 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision).

consignors that he was the actual purchaser of their livestock was "inherently unfair" because "the market agent had a fiduciary duty to his consignors," and that such failure "may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm" (754 F.2d at 809). Hence the Ninth Circuit recognized in *Bosma* that whether a specific showing of actual harm is necessary depends on the type of violation alleged.

Finally, in *Farrow* v. *USDA*, 760 F.2d 211, 215 (8th Cir. 1985), involving an agreement by two competitors not to compete for certain cows at an auction market, the court held that "actual injury" need not be proven because the "purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered." The court said that "the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation" (*id.* 215).

If the cases requiring proof of a likelihood of injury are to be followed (which we believe is unsound), they should only be followed in the same types of cases in which the holdings were made. Holdings in all cases should be confined and limited to the facts under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). That principle was applied in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626–27 (1935), with respect to the decision in *Myers* v. *United States*, 272 U.S. 52 (1926), in which it is said that the numerous expressions in the *Myers* case beyond the "narrow point actually decided" do not come within the rule of *stare decisis* (295 U.S. at 626). Again the principle was followed in *Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98, 102–04 (1937), with respect to the prior decision in *Taylor* v. *United States*, 207 U.S. 120, 124–25 (1907).

Many types of practices have been held to be "unfair" under the Packers and Stockyards Act without any proof of predatory intent or likelihood of injury. For example, it is an "unfair" practice for a livestock market agency to engage in business without a bond irrespective of any likelihood of injury. *E.g.*, *In re Hoth*, 36 Agric. Dec. 1812, 1817–19 (1977). In *Hoth*, the livestock market agency contended that there was no need for him to have a bond since he bought livestock only for a large packing agency, which was bonded, and he operated only with the packer's funds and paid for all livestock with checks drawn on the packer. There was no real "likelihood"

of injury there, but the market agency's practice of operating without his own bond was, nonetheless, held to be an "unfair" practice.

If proof of a likelihood of injury were required in cases involving the failure of a respondent to have the required bond, all, or almost all, of the bonding violation cases would be dismissed. It would be virtually impossible to predict, in advance, that a particular respondent was *likely* to go broke owing money for livestock. We know from experience that a number of firms will go broke each year and that without the required bond, there will be injury to livestock sellers. But we do not have a crystal ball to enable us to make a finding of fact that the failure of a *particular respondent* to have a bond is *likely* to result in injury.

Similarly, careless or deliberate false weighing is an "unfair" practice under the Act irrespective of any proof of predatory intent or likelihood of injury.[18] Anyone who thinks that the likelihood of injury in a false weighing case is obvious is unaware of the intricacies of false weighing violations. For example, a livestock buying station might increase the price to compensate for the short weight, or regular buyers at a livestock auction market, who would know of the short weights, might increase their bids in consideration of the short weights. All false weighing is routinely held to be an "unfair" practice, without proof as to whether there is a likelihood of injury, and in many cases, it would have been difficult, if not impossible, to prove such a likelihood.

Similarly, with respect to custodial account violations, the Department has always taken the position that it is an unfair practice for a livestock auction market to fail to properly maintain a Custodial Account for Shippers' Proceeds irrespective of any likelihood of injury.[19] And in custodial account violation cases, the De-

[18] *In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Loretz*, 36 Agric. Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

[19] *In re Powell*, 41 Agric. Dec. 1354, 1361 (1982); *Hyatt and Ward* v. *United States*, 276 F.2d 308, 309-13 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932); *In re Roseth*, 39 Agric. Dec. 28, 36 (1980), *aff'd per curiam*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310-11, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 667, 673 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller*, 33 Agric. Dec. 53, 59-62, *aff'd per curiam*, 498 F.2d 1088 (5th Cir.

Continued

partment has never been required to prove a likelihood of injury.[20] For example, in *Daniels* v. *United States*, 242 F.2d 39, 40-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957), the court held:

> The improper handling and use of the shippers' proceeds is plainly contrary to the Act, 7 U.S.C.A. §§ 205, 208 and 213(a), and of the regulations (9 CFR § 201.40-201.42.) The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. Federal Trade Commission *v.* Raladam Co., 316 U.S. 149, 152, 62 S.Ct. 966, 86 L.Ed. 1336; Fashion Originators' Guild of America *v.* Federal Trade Commission, 312 U.S. 457, 466, 668, 61 S.Ct. 703, 85 L.Ed. 949.

Similarly, in *Bowman* v. *USDA*, 363 F.2d 81, 85 (5th Cir. 1966), the court held:

> And the Act is designed to "* * * prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required." Daniels *v.* United States, 7 Cir., 1957, 242 F.2d 39, 42.

In fact, in most custodial account cases, the Department would be unable to prove a likelihood of injury. Although we know from experience that about 10 to 20 auction markets go broke each year, and that about 3 to 6 of them will not have a bond adequate to cover the total losses, we do not have a crystal ball that would enable us to make a finding of fact that the failure of a *particular respondent* to maintain his custodial account properly is *likely* to result in injury.

As stated in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law* 282 (1981) (footnotes omitted):

1974); *In re Bowman*, 23 Agric. Dec. 1065, 1068-71 (1964); *In re Bowman*, 23 Agric. Dec. 1074, 1086-87 (1964), *aff'd*, 363 F.2d 81, 85-86 (5th Cir. 1966).

[20] *In re Roseth*, 39 Agric. Dec. 28, 33, *aff'd*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Miller*, 33 Agric. Dec. 53, 62-63, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *Bowman* v. *USDA*, 363 F.2d 81, 84-86 (5th Cir. 1966); *Hyatt and Ward* v. *United States*, 276 F.2d 308, 310-13 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 40-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932).

The fact that no one suffered from a particular custodial account shortage is no defense, since it is the duty of the Packers and Stockyards agency to prevent potential injury by stopping unlawful practices in their incipiency. However, if the likelihood of injury test as applied in some judicial decisions were applied to custodial account violations, most of the complaints filed alleging custodial account violations would be dismissed. Rarely would it be possible to prove that injury would likely result from a particular custodial account shortage. Usually there would be a reasonable expectation that the time lag between the writing and cashing of the checks would prevent a default. Frequently there would be a line of credit from the bank. Almost always there would be a bond that could be relied on to cover part of any losses.

The most that could be shown is that if all or many of the market agencies selling livestock generally had custodial account shortages, there would be a likelihood that some of them would result in injury. Accordingly, it is the department's position that where there is a custodial account shortage, there is no need to show injury or likelihood of injury in a particular case. No court has required proof of a likelihood of injury in custodial account violation cases.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g., In re Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974),[21] which is set forth as Appendix A to this decision.[22] The Department's sanction policy is also discussed at length in *In re Esposito,* 38 Agric. Dec. 613, 624-65 (1979).

The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 193(b)):

> (b) . . . The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

In view of the size of the business involved here, the many violations, and the fact that commercial bribery is such a serious offense that it would, if not checked, undermine the entire meat marketing system in the United States, a civil penalty greatly in excess of $50,000 would be warranted here. The ALJ, in determining that

[21] The Department's severe sanction policy did not originate with *Worsley,* but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner,* 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller,* 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam,* 498 F.2d 1088 (5th Cir. 1974).

[22] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier,* 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.,* 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd,* No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.,* 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler,* 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.,* 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.,* 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland,* 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.,* 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.,* 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam,* 558 F.2d 748 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978); *In re Catanzaro,* 35 Agric. Dec. 26, 31-32 (1976), *aff'd,* No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.,* 34 Agric. Dec. 773, 796, 801 (1975), *aff'd,* 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.,* 34 Agric. Dec. 700, 750, 762 (1975), *aff'd,* 549 F.2d 830 (D.C. Cir.), *cert. denied,* 434 U.S. 920 (1977); *In re Southwest Produce, Inc.,* 34 Agric. Dec. 160, 171, 178, *aff'd per curiam,* 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons,* 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam,* 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.,* 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd,* 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.,* 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller,* 33 Agric. Dec. 53, 64-80, *aff'd per curiam,* 498 F.2d 1088, 1089 (5th Cir. 1974).

a $25,000 civil penalty should be assessed, stated (Initial Decision at 28):

> Indeed, as Mr. MacDonald testified, the violations charged, and found, are serious because of their anti-competitive effect on the industry and the undermining of the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats. Mr. MacDonald, representing P&S views, believes that such a large monetary sanction [$50,000] is appropriate and necessary as an effective deterrent in precluding such activities in the industry in the future. However, sanctions, as well as being a deterrent, must also be realistic. The monetary sanction sought here is not realistic. Therefore, I find that a monetary civil penalty of $25,000, to be assessed jointly and severally, is a more realistic sanction and at the same time will also accomplish the purpose of a sanction, i.e., act as a deterrent to preclude such activities in the industry for the future.

future similar cases, this case will not be regarded as a precedei limiting the amount of future sanctions.

It should be noted that this case and *In re Holiday Food Service Inc.*, 45 Agric. Dec. ____ (May 8, 1986), also decided this day, ai the first litigated cases involving commercial bribery committe after the Act was amended to authorize civil penalties. In *Holida Food Services*, a $50,000 civil penalty is also being assessed agains a defunct corporation and the individual who was its chief execu tive officer and 50% owner.

Respondent Wiggs suggests that the penalty is too severe sinc "[l]ittle people [like respondents] don't go around offering to cor rupt big people [like IBP and Farmland]" (Appeal Response at 6) Respondent Wiggs suggests that the impetus for the bribes mus have come from IBP and Farmland—not respondents. Althougl there is no evidence as to who initially suggested the unlawful pay ments, and the individual respondents did not testify, it would not be a mitigating circumstance if the IBP and Farmland officials sug gested the profit-sharing scheme. Commercial bribery is destructive of the meat marketing system in the United States irrespective of who originates the fraudulent scheme.

With respect to "the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 193(b)), the Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, *e.g.*, *In re Peterman*, 42 Agric. Dec. ____ (slip op. at 1c) (Dec. 12, 1983), *aff'd*, No. 84-1053 (10th Cir. Aug. 13, 1985) (respondent allegedly unable to pay $20,000 civil penalty should have introduced evidence to that effect at the hearing); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as Appendix B to this decision.[24] In any event, however, this case is distinguishable from *Bosma*.

[24] *In re Upton*, 44 Agric. Dec. ____ (slip op. at 32) (Oct. 2, 1985); In re Saylor, 44 Agric. Dec. ____ (slip op. at 524-26) (Sept. 20, 1985) (final decision on remand) (respondent should have introduced evidence showing that he could not pay a $10,000 civil penalty).

Respondent Corn State Meat Company, Inc., has been out of business for several years, and there is no indication that it will ever be operative again. Hence the civil penalty imposed in this case cannot have any effect on respondents' ability to continue in business.

The Act requires the Secretary to consider the "size of the business involved," i.e., the business involved in the particular proceeding, and the effect of the penalty on the "person's ability to continue in business," i.e., to continue in the business involved in the proceeding. The Act does not require the Secretary to consider whether the penalty will have an effect on some unrelated business venture not involved in the proceeding.

Since respondents will not continue the Corn State Meat Company, Inc., meat business irrespective of any civil penalty in this case, which is the only relevant business to be considered under the Act, it is irrelevant whether a civil penalty will have any effect on respondents' ability to continue some other business. (The record shows that respondent Prince has been a bartender for the last 2 years (Tr. 188), and contains no evidence as to respondent Wiggs' present employment.) Hence the criterion relating to the effect of the penalty on the person's ability to continue in business is not applicable here.

Finally, it should be noted that commercial bribery is so inimical to the meat packing industry that it would be in the best interests of the meat packing industry for any person found to have engaged in commercial bribery to discontinue his meat packing business. Accordingly, a civil penalty imposed for commercial bribery that prevented a person from continuing his meat packing business would be in the public interest. As stated in *In re Saylor,* 44 Agric. Dec. ___ (slip op. at 526) (Sept. 20, 1985) (decision on remand) (8-month suspension order and $10,000 civil penalty):

> The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act.

The civil penalty was properly issued jointly and severally ainst the respondent corporation and the individuals who own, ect and control the corporation. As stated in *In re Pastures, Inc.,* Agric. Dec. 395, 397 (1980):

Respondents [i.e., the president of the corporation and his wife, who was the sole owner and secretary-treasurer of the corporation] are in error in believing that an order cannot be issued against them as individuals unless they personally caused the corporation's insolvency by embezzlement or [mis]appropriation of funds. *Sebastopol Meat Co.* v. *Sec. of Agr.*, 440 F.2d 983, 983-986 (9th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S.D.A.*, 438 F.2d 1332, 1342-1343 (8th Cir. 1971); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. [171, 173] (Jan. 30, 1980); *In re Norwich Veal & Beef, Inc., 37 Agric. Dec. 1202, 1205 (1978); In re Mid-States Livestock, Inc.*, 36 Agric. Dec. 172, 192-196 (1977), *aff'd*, 570 F.2d 701 (8th Cir. 1978); and *see Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025, 1030-1031 (E.D. Pa. 1978); *Fillippo* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1015-1018 (E.D. Pa. 1978).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Corn State Meat Company, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondents Terrance P. (Terry) Prince, Jr., and James L. Wiggs, individually or as owners, officers or directors of any packer subject to the Act, shall cease and desist from:

1. Directly or indirectly giving or offering to give, or permitting or causing to be given, money or anything of more than nominal value to, or for the benefit of, an officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence any such customer or prospective customer to purchase or promote the purchase of meat, meat food products or livestock products from or through respondents; and

2. Soliciting or accepting favored treatment for respondents, or for any customer or prospective customer of respondents, through the offer or the gift of money or anything of more than nominal value to or for the benefit of any officer, director, agent or employee of a supplier of meat, meat food products or livestock products to respondents or to any customer or prospective customer of respondents.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Corn State Meat Company, Inc., respondent Terrance P. (Terry) Prince, Jr., and respondent James L. Wiggs are hereby assessed, jointly and severally, a civil penalty of fifty thousand dollars ($50,000).

The cease and desist provisions of this order shall become effective as to each respondent on the day after service of this order on such respondent.

The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250, not later than the 90th day after service of this order on respondents.

APPENDIX A

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Ed.]

APPENDIX B

Petition for Rehearing filed in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984) (Note: This Petition for Rehearing is printed as an appendix to *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985))

[Excerpt omitted.—Ed.]

In re: HOLIDAY FOOD SERVICES, INC. and NAT ROCKER. P&S Docket No. 6488. Decided May 8, 1986.

Packer—Commercial bribery—Civil penalty.

The Judicial Officer reversed Chief Judge Campbell's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The Administrative Law Judge's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1977 to 1982 by making payments to buyers for four firms in connection with meat, meat food products, poultry and poultry products sold by respondents to the firms. Commercial bribery violates §§ 202 (a) and (b) of the Act. The civil penalty may be applied against the corporation and the person who was its chief executive officer, a director, and a 50% shareholder of the corporation. Severe sanction policy was explained. The *Bosma* decision, requiring the Department to produce evidence as to the effect of the penalty on the person's ability to continue to do business, is erroneous. But *Bosma* is irrelevant because respondent corporation is out of business. Commercial bribery is so inimical to the meat packing industry that it would be in the public interest to impose a civil penalty that would adversely affect the person's ability to continue in business. Consent orders are given no weight in determining the sanction to be imposed in a litigated case. Any damage resulting from an agency's press release is not considered in determining the sanction to be imposed.

Thomas C. Heinz, for complainant.
Harry G. Melkonian, Los Angeles, California, for respondents.
John A. Campbell, Chief Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on February 14, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) in which he found that respondents engaged in "commercial bribery" from 1977 to 1982 by making payments to buyers for four firms in connection with meat, meat food products, poultry and poultry products sold by respondents to the firms. The ALJ ordered respondents to cease and desist from such activities, and respondents were assessed, jointly and severally, a $25,000 civil penalty.

On March 1, 1986, complainant, seeking a $50,000 civil penalty, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 24, 1986, respondents filed a cross-appeal. On April 9, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the ALJ's findings and conclusions are adopted as the final decision in this case, with changes too minor to itemize, except that the figure $25,000 is changed to $50,000 in the discussion as to the sanction. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et. seq.*), hereafter called the "Act", instituted by a complaint filed on February 11, 1985, by the Packers and Stockyards Administration. The complaint alleged that the corporate respondent, under the management, direction and control of the individual respondent, made kickback payments to four employees of meat buyers in Hawaii, thereby violating sections 202(a) and 202(b) of the Act (7 U.S.C. §§ 192(a), 192(b)). Respondents filed an answer denying that the corporate respondent is a packer within the meaning of and subject to the provisions of the Act, and denied that the company made any kickbacks or that Mr. Rocker managed, directed or controlled the corporation. Respondents alleged that payments to the four employees were for lawful purposes. Respondents also alleged various affirmative defenses.

An oral hearing was held October 22 and 23, 1985, in Los Angeles, California. Respondents were represented by Harry G. Melkonian and Patricia M. Wilson of Buchalter, Nemer, Fields, Chrystie & Younger, Los Angeles, California. Complainant was represented by Thomas C. Heinz, Office of General Counsel, United States Department of Agriculture, Washington, D.C. At the close of the hearing, the time was set for the filing of briefs.

FINDINGS OF FACT

1. Holiday Food Services, Inc., hereafter "respondent Holiday", at all times material herein was a California corporation which was formed in 1976 and continued to operate until mid-1983. To date, the corporation has not been dissolved. Respondent Holiday has engaged in the business of marketing meats, meat food products and poultry products, acting as a wholesale broker, dealer or distributor in commerce, and is a packer within the meaning of and subject to the Act (7 U.S.C. § 191(c)). (Transcript of hearing [Tr.] 317–318, 320)

2. The principal executive and principal business offices of respondent Holiday are at 405 Centinela Avenue, Inglewood, California, where they have been located since the formation of the corporation in 1976. With the exception of petty cash records and other minor records, all books and records of respondent Holiday were maintained at the Inglewood, California, offices. All of respondent Holiday's customers were located in the State of Hawaii.

3. Respondent Holiday shares the same offices, directors, and officers with Holiday Meat and Provision Corporation, which is wholly owned by respondent Nat Rocker.

4. Nat Rocker, hereafter "respondent Rocker", is an individual residing at 4991 Amigo, Tarzana, California 91356. At all times material herein, respondent Rocker was the chief executive officer, a director, and a 50% shareholder of respondent Holiday. Ron Vogel is the other owner but has had no responsibilities in the operation of respondent Holiday since 1980 or 1981. Before that time his only responsibility was to serve as accountant for the company.

I

5. During the period from January 1977, through May of 1983, respondent Holiday sold meat, meat food products, poultry and poultry products to Flagship International, Inc., which purchased the products under the trade name "Sky Chefs" in Hawaii.

6. During the period from January 1977, through May 1983, Sky Chefs employed Nick Rodrigues, Sr., in a capacity which included responsibility for purchasing food products on behalf of his employer. During the same period Sky Chefs purchased meat, meat food products, poultry and poultry products from respondent Holiday, respondents also made monthly payments by check to Nick Rodrigues, Sr., from February 1977, through June 1980, as found in complainant's exhibit (Cx) 2. (See also Tr. 110–111). This exhibit correlates Sky Chefs' monthly purchase payments to respondents, with monthly payments by respondents to Mr. Rodrigues. Thirty-four checks in payment to Rodrigues are listed on the exhibit totalling $11,413.49.

From February 1977 through February 1980, in the vast majority of cases, those monthly payments equalled one percent of the cost of products purchased by Sky Chefs from respondent Holiday during the preceding month. (Cx 2, pp. 1–20; Cx 39, pp. 1–32). The check payments to Rodrigues covering the months of February, March, April, May and June of 1980 were equal to or about equal to two percent of the cost of Sky Chefs' purchases from respondent Holiday. (Cx 2, pp. 21–24; Cx 39, pp. 33–37)

7. The record contains copies of 39 checks [1] issued to Rodrigues (Cx 39, pp. 1–38; Cx 3, p. 14) which total $13,475.57. All but two of these checks were signed by respondent Rocker.

[1] Checks which duplicate those contained in Cx 39 (and Cx 40, 41, and 42 *infra*,) were not counted; e.g. Cx 4, p.8; Cx 5, p.22, etc.

8. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms numbered 1096 and 1099 to Rodrigues which total $6,711.87.

9. In addition to the check payments as shown in complainant's exhibits 3 and 39, respondents also made payments in cash to Rodrigues during the period Larry Luxenberg served as Honolulu manager for respondent Holiday. Mr. Luxenberg made these payments upon instructions from respondent Rocker and was reimbursed by respondent Holiday. (Tr. 47-51; Cx 37)

10. Mr. Rodrigues' receipt of payments from respondents violated his employer's conflict of interest policy. (Tr. 79-82; Cx 15)

II

11. During the period from January 1977, through May 1982, respondent Holiday sold meat, meat food products, poultry and poultry products to Kauai Resort Hotel in Hawaii. During this period, Kauai Resort Hotel employed Chris Chang as general manager with purchasing responsibilities for food. Mr. Chang was responsible for the purchases from respondent Holiday.

12. In 1977, Mr. Chang began receiving monthly payments by check from respondents. Beginning in 1980 until May of 1982, the payments were made in cash by Larry Luxenberg. (Tr. 16, 51; Cx 37) Monthly sales summations made by complainant's investigator (Cx 16) show in most cases that check payments to Mr. Chang equalled two percent of the sales by respondent Holiday to Kauai Resort Hotel. Thirty-five checks in payment to Mr. Chang are listed on the exhibit totaling $9,302.41.

13. The record contains copies of 27 checks issued to Chang totaling $8,009.42. (Cx 40, pp. 1-26; Cx 17, p.5) All 27 checks were signed by respondent Rocker.

14. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms (1096 and 1099) to Chang which total $7,566.42 (Cx 26).

III

15. During the period from April 1979, through January 1980, respondent Holiday sold meat, meat food products, poultry and poultry products to Hawaiian Regent Hotel in Hawaii. During this period, the Hawaiian Regent Hotel employed Richard Albanese as executive chef, with responsibilities which included the purchase of food for the hotel. (Tr. 32-33). During the same period respondents made payments to Richard Albanese approximating one to three percent of the hotel's purchases from respondent Holiday. Monthly

sales summations made by complainant's investigator (Cx 27) list five checks in payment to Mr. Albanese totaling $3,392.60.

16. The record contains copies of five checks issued to Albanese also totaling $3,392.60. (Cx 42, pp. 1-5). Four of these checks were signed by Nat Rocker.

17. For the year 1979, respondent Holiday issued an Internal Revenue Service form 1099 to Albanese in the amount of $2,608.60.

18. The receipt by Richard Albanese of these payments from respondents violated his employer's employment policies.

IV

19. During the period from April 1977, through March 1979, respondent Holiday sold meat, meat food products, poultry and poultry products to Plantation Gardens, a resort hotel in Hawaii. The hotel employed Mel Wabinga as a chef with responsibilities for purchasing food for the hotel during this period. Monthly sales summations made by complainant's investigator (Cx 33) list 22 checks in payment to Mr. Wabinga totaling $1,771.08.

20. The record contains copies of 29 checks issued to Wabinga totaling $2,314.08 (Cx 41, pp. 1-26; Cx 34, pp. 1,2,3). Twenty-eight of the 29 checks were signed by Nat Rocker.

21. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms (1096 and 1099) to Wabinga which total $1,831.21. (Cx 35)

22. If Mr. Wabinga's employers had known about these payments at the time they were made, he would have been fired. (Tr. 92)

CONCLUSIONS

All contentions of the parties (including respondents' objections regarding complainant's reply brief) have been considered in the light of the record evidence. By reason of the above findings of fact, I conclude that respondents violated sections 202(a) and 202(b) of the Act (7 U.S.C. 192(a), (b)). The respondents are ordered to cease and desist and pay a civil penalty of $50,000.00.

VIOLATIONS

Four buyers, Rodrigues, Chang, Albanese, and Wabinga, were identified as having responsibility for the purchase of meat and meat food products for their employers. All four buyers purchased such products from respondent Holiday and received payments from respondents in the form of checks totaling $27,191.67 (Findings 7,13,16,20). In addition, the record identifies two of the buyers (Rodrigues and Chang) as receiving cash payments from respondents. (Tr. 15-16, 47-51, C)

Two of the four buyers (Wabinga and Chang) testified at the hearing.

Mr. Wabinga described his business relationship with respondent Holiday at Tr. 266-268, as follows:

Q. All right. Are you familiar with a company called Holiday Food Services?

A. Yes, I do.

Q. How did you become familiar with that company?

A. Well, someone approached me from the Mainland saying that they're new in Hawaii, that they would like to promote Holiday Food in Hawaii.

Q. And when did that occur?

A. Pardon?

Q. When did that occur?

A. Year, or ——

Q. In the year, approximately.

A. Year. I think it's in '78 or '79.

Q. Okay.

A. And they asked me that they was going to promote the meat, Holiday foods, in Hawaii, that if I was interested to buy some meat. And I said, "It all depends how much it costs, and, you know, freight-wise, and everything."

Q. For whom were you working at that time?

A. At the Plantation Gardens.

Q. And what was your position?

A. Executive Chef.

Q. Did your responsibilities include the purchase of meat and meat food products?

A. Yes.

Q. Did you decide to purchase meat from Holiday Food Services?

A. Well, I said, "Yeah, I would like to try." You know, as long as the price is within range I would give them a chance to buy the—buy their meat from them.

Q. And how long did you purchase meat from Holiday Foods?

A. About a year or a year and a half.

Q. Did you receive any payments personally from Holiday Food Services during that period?

A. Yes, I did.

Q. In what form? Did you receive cash payments?

A. No, it's a check, a weekly (ph.) check.

Q. How often?

A. All depends if you order your meat from them they'll give you a check. If you don't order from them—let's say if I have enough and I didn't order from them then I wouldn't receive any.

Q. All right. Why did you receive those payments during that period?

A. Well, they told me they'd give me a little something if I did buy it from them.

Q. I'm sorry, sir, I did not hear your answer.

A. Oh. They told me if I buy meat from them it will be a little cheap and I would have payment for them—from them—for buying meat from them.

Q. And who told you that?

A. Larry Luxenberg. Is that his last name?

Q. I believe there was a man named that associated with Holiday Food.

A. What was his name again?

Q. Larry Luxenberg.

A. Yeah, that's the guy; that's the guy that I talked to, Larry Luxenberg.

Respondents challenge the accuracy of Wabinga's testimony as "confused, ambiguous and unclear." (Brief, p. 11) Respondents base this challenge upon Wabinga's identification of Mr. Larry Luxenberg as the individual he spoke to in 1978 about receiving payments from respondent Holiday. (See also Tr. 270-271)

Mr. Luxenberg owned Lux Foods, which operated in Honolulu until the operation was sold to respondents in 1974. Thereafter, in 1980, he became the general manager of respondent Holiday's operation in Honolulu (Tr. 44-47, 280-281).

While the record discloses no formal relationship between Luxenberg and respondents during the period 1974-1980, and while Wabinga might have been confused about his conversation with Luxenberg in 1978, his testimony about his receipt of check payments from respondents is clear and unambiguous, and is corroborated by his receipt of 29 checks from respondents (Finding 20).

Another buyer, Chris Chang testified. (Tr. 12-29). He testified that he received checks in the period 1976-1979, and cash thereafter through 1982 from Larry Luxenberg. Luxenberg's affidavit (Cx 37) and his testimony (Tr. 51) confirm the payment of cash.

Chang also testified that he understood the payments were for his referrals of respondents to other buyers. Chang made no introduction. He just told respondent's salesmen to "mention my name." (Tr. 26).

Mr. Chang's explanation of the reason for payments is not persuasive. The payments were not sporadic as one might expect from a casual reference here and there, but were monthly payments based in large measure on the volume of sales to his employer. (Findings of Fact 6 and 7).

Buyer Albanese and Rodrigues did not testify and could not be reached by complainant's investigator or refused to be interviewed (Tr. 98, 187-188). However, record evidence shows the receipt of payments, cash and checks to Rodrigues, and checks to Albanese, from respondents. (Findings of Fact 5-9, 15-17). Speculation about possible services rendered by these two buyers is not persuasive.

The totality of the facts contained in the record lead to the conclusion that respondents committed unfair trade practices, commonly called "commercial bribery", and thereby violated Sections 202(a) and 202(b) of the Act [2], by the payments to the four buyers named above.

[2] Sec. 202. It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or . . . (7 U.S.C. 192(a), (b)).

As complainant correctly urges (main brief pp. 8-9):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Past decisions have established commercial bribery to be a violation of the Act. *In re National Beef Packing Co.*, 36 A.D. 1722 (1977), *aff'd*, 605 F.2d 1167 (CA 10, 1979)); *In re Gol-Pak Corporation*, 27 A.D. 228 (1968); *In re Hygrade Food Products Corporation*, 26 A.D. 825 (1967).

NAT ROCKER

It is respondents' position that the testimony of Nat Rocker clearly establishes his innocence from any wrongdoing. (Brief pp. 18-28).

Of great weight in this proceeding is the fact that of the 100 payment checks to the four buyers, 96 were signed by respondent Rocker. (Findings of Fact 7,13,16,20).

Larry Luxenberg testified about the payments to the buyers, and indicated that such payments were ongoing, existing even before his arrival in Hawaii in 1980. His testimony further indicates that he was reimbursed for cash payments, and that his disbursements were on instructions from Los Angeles. (Tr. 47-51). Luxenberg's affidavit (Cx 37) states that he paid cash to various food buyers "per the instructions of Nat Rocker."

In these circumstances, Nat Rocker cannot assert that the actions of Luxenberg or of the other managers in Hawaii were outside the scope of their employment.

Further, Nat Rocker's testimony of his disinterest, lack of control, and neglect of respondent Holiday Foods is hard to believe when contrasted with his success with and attention to Holiday Meat and Provision Corporation, hereinafter called "Holiday Meat." Respondent owns 100% of the stock of the Holiday Meat

Corporation, whose current annual volume of business is about 18 million dollars. (Tr. 277-294, 310-335).

Contrary to respondents' position, the record shows a deep involvement by respondent Rocker in the management of respondent Holiday. Aside from respondent Rocker's issuance of checks and instructions to Luxenberg, previously discussed, the record discloses that Rocker, and/or his California office: maintained all the books and records for respondent Holiday (Tr. 48, 68, 327-329); did most of the purchasing (Tr. 322-324); gave detailed and daily instructions to the Honolulu office of respondent Holiday (Tr. 48; Cx 37); and regularly discussed profits and losses with the Hawaii managers. (Tr. 328-33)

Respondent Rocker cannot avoid personal responsibility here. The record demonstrates that he was responsible for the operation of the respondent corporation. *In re Pastures, Inc.*, 39 A.D. 395, and cases cited at 397 (1980).

SANCTION

The respondents' violations are serious and repeated. Section 203(b) of the Act (7 U.S.C. § 193(b)) authorizes a civil penalty of $10,000 for each violation of the Act.

In consideration of the gravity of the violations, the size of the business involved, and the effect upon the ability to remain in business, a civil penalty in the amount of $50,000.00 is imposed, in addition to an order to cease and desist.

Respondents' competitors, and the customers involved herein, were injured by respondents' violations. As noted above, the violations were serious and repeated, thus requiring the imposition of a severe sanction.

While complainant was not successful in gathering financial information fromrespondents (Tr. 337-339), the record does reveal the following:

a. Respondent Holiday is defunct, and its dissolution is anticipated. Thus the sanction imposed may possibly be levied solely against respondent Rocker.

b. Respondent Holiday suffered a loss of about $800,000 which is owing to Holiday Meats (Tr. 322).

c. Holiday Meats, wholly owned by respondent Rocker, is a successful enterprise, with a current annual volume of business of 18 million dollars. (Tr. 316, 320)

Accordingly, it would appear that the imposition of a $50,000.00 civil penalty is clearly warranted in light of the nature and seriousness of the violations committed.

Likewise, the amount of the civil penalty, though large enough to deter future violations by respondents and other potential violators, will not adversely affect respondent Rocker's ability to remain in business.

For the foregoing reasons the following order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

For the reasons set forth by the ALJ, respondents' violations are serious and repeated, occurring continuously over a 5-year period.

It is the policy of this Department to impose severe sanctions for serious or repeated violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),[3] which is set forth as Appendix A to this decision.[4] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

[3] The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[4] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir.1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

Respondents argue that "[t]here is nothing left to deter" since "Holiday Food no longer exists" (Cross-Appeal at 7). But that argument overlooks the fact that the Department's sanction policy is meant to deter other potential violators, as well as the particular respondents involved in a pending proceeding.

Respondents contend that the $25,000 civil penalty assessed by the ALJ is too severe in view of respondents' financial condition (Cross-Appeal at 9-12). The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 193(b)):

> (b) . . . The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

The Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, *e.g.*, *In re Peterman*, 42 Agric. Dec. ____ (slip op. at 1c) (Dec. 12, 1983), *aff'd*, No. 84-1053 (10th Cir. Aug. 13, 1985) (respondent allegedly unable to pay $20,000 civil penalty should have introduced evidence to that effect at the hearing); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma v. USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as Appendix B to this decision.[5] In any event, however, this case is distinguishable from *Bosma*.

Respondent Holiday Food Services, Inc., has been out of business for several years, and respondent Rocker contends that he is planning to dissolve that corporate business. Hence the civil penalty imposed in this case cannot have any effect on respondent Rocker's ability to continue the Holiday Food Services business.

[5] *In re Upton*, 44 Agric. Dec. 2238 (slip op. at 32) (Oct. 2, 1985); *In re Saylor*, 44 Agric. Dec. 2238 (slip op. at 524-26) (Sept. 20, 1985) (final decision on remand) (respondent should have introduced evidence showing that he could not pay a $10,000 civil penalty).

The Act requires the Secretary to consider the "size of the business involved," i.e., the business involved in the particular proceeding, and the effect of the penalty on the "person's ability to continue in business," i.e., to continue in the business involved in the proceeding. The Act does not require the Secretary to consider whether the penalty will have an effect on some unrelated business venture not involved in the proceeding.

Since respondent Rocker will not continue the Holiday Food Services, Inc., meat business irrespective of any civil penalty in this case, which is the only relevant business to be considered under the Act, it is irrelevant whether a civil penalty will have any effect on respondent Rocker's ability to continue his Holiday Meat & Provision Corporation business.

Furthermore, it should be noted that complainant's investigator repeatedly requested financial information relating to Holiday Food Services, Inc., and Holiday Meat & Provision Corporation, but respondents failed to supply the requested information (with the exception of one tax return) (Tr. 186-87, 337-40). This, again, is a circumstance that distinguishes this case from *Bosma*.

In addition, even if it were relevant to determine whether a $50,000 civil penalty will affect respondent Rocker's ability to continue his separate business as Holiday Meat & Provision Corporation, he has failed to demonstrate on the record that such a civil penalty would prevent him from continuing to operate that business.[6]

Finally, it should be noted that commercial bribery is so inimical to the meat packing industry that it would be in the best interests

[6] The "Declaration of Nat Rocker" attached to respondents' cross-appeal, relating to the financial condition of his businesses, was not introduced as evidence and, therefore, cannot be considered on appeal. Also, there is no basis for reopening the hearing to receive evidence in this respect since the Department's uniform rules of practice applicable to disciplinary proceedings (7 CFR § 1.146(a)(2)) requires the same type of showing, in this respect, as court rules relating to newly discovered evidence. *In re DeJong Packing Co.*, 36 Agric. Dec. 1319, 1320 (1977) (order denying rehearing), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 795 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 428-29 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1910, 1910-11 (1981) (order denying reopening), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (reinstating *nunc pro tunc* original order of Oct. 20, 1982, *aff'd* 40 Agric. Dec. 1468), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Winger*, 38 Agric. Dec. 182, 188 (1979, *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979). Respondents have made no showing why this information could not have been presented at the hearing.

of the meat packing industry if any person found to have engaged in commercial bribery discontinued his meat packing business. Accordingly, a civil penalty imposed for commercial bribery that prevented a person from continuing his meat packing business would be in the public interest. As stated in *In re Saylor*, 44 Agric. Dec. ——— (slip op. at 526) (Sept. 20, 1985) (decision on remand):

> The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act.

Respondents contend that the evidence is weak as to respondent Rocker's personal involvement in the violations, but the ALJ, who saw and heard the witnesses testify, found it "hard to believe" Nat Rocker's "testimony of his disinterest, lack of control, and neglect of respondent Holiday Foods" (Initial Decision at 17). There is no basis in the record for setting aside his determination in this respect.

In addition, the ALJ correctly held that an order may be issued against an individual, in the circumstances shown here (Initial Decision at 18), citing *In re Pastures, Inc.*, 39 Agric. Dec. 395, 397 (1980). In *Pastures*, it is stated (*id.*):

> Respondents [i.e., the president of the corporation and his wife, who was the sole owner and secretary-treasurer of the corporation] are in error in believing that an order cannot be issued against them as individuals unless they personally caused the corporation's insolvency by embezzlement or [mis]appropriation of funds. *Sebastopol Meat Co.* v. *Sec. of Agr.*, 440 F.2d 983, 983–986 (9th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S.D.A.*, 438 F.2d 1332, 1342–1343 (8th Cir. 1971); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. [171, 173] (Jan. 30, 1980); *In re Norwich Veal & Beef, Inc.*, 37 Agric. Dec. 1202, 1205 (1978); *In re Mid-States Livestock, Inc.*, 36 Agric. Dec. 172, 192–196 (1977), *aff'd*, 570 F.2d 701 (8th Cir. 1978); and *see Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025, 1030–1031 (E.D. Pa. 1978); *Fillippo* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1015–1018 (E.D. Pa. 1978).

Respondents contend that in a recent case brought against Dubuque Packing Company, in which Dubuque was charged with paying over $80,000 in commercial bribes, a $30,000 civil penalty was assessed (*In re Dubuque Packing Co.*, 44 Agric. Dec. ____ (Dec. 13, 1985)), which is about one-third the amount of the bribes paid, whereas a $50,000 civil penalty in this case would be almost twice as much as the proven bribes paid. However, it is well settled that consent orders "should be given no weight whatsoever in determining the sanction to be imposed in a litigated case" (*In re Worsley*, 33 Agric. Dec. 1547, 1569 (1974)), Appendix A at 23a. Furthermore, there is no policy of imposing a civil penalty in commercial bribery cases equal to a certain percentage of the amount of the bribes paid. (That is not one of the criteria set forth in the statute). In fact, since this is the first litigated case involving commercial bribery that has been decided by this Department after the Act was amended to authorize civil penalties, there is no prior precedent.[7]

In another case involving commercial bribery, in which the Decision and Order is being filed this day, a $50,000 civil penalty is also being imposed jointly and severally against a defunct corporation and two individuals. *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986). In *Corn State*, concern is expressed as to whether a $50,000 civil penalty is adequate to serve as an effective deterrent to commercial bribery (in view of the large profits that can be made from commercial bribery and the difficulty of detection). I have the same concern here. If complainant requests greatly increased sanctions in future similar cases, much larger civil penalties will be imposed.

Respondents contend that they have already suffered damage because of the Department's press release issued in this case, but it is well settled that any damage resulting from an agency press release is not considered in determining the sanction to be imposed in a proceeding.[8]

[7] Prior litigated cases involving commercial bribery related to offenses committed before the 1976 amendment authorizing the imposition of civil penalties. *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-36 (1977), *aff'd*, 605 F.2d 1167, 1168-69 (10th Cir. 1979); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 552-53 (1981); *In re Gol-Pak Corp.*, 27 Agric. Dec. 228, 232-35 (1968); *In re Hygrade Foods Prods. Corp.*, 26 Agric. Dec. 825, 829-32 (1967).

[8] *In re Speight*, 33 Agric. Dec. 280, 304-05 (1974); *In re Miller*, 33 Agric. Dec. 53, 81-82, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974). In *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 188 (1973), the Court upheld a suspension order under the act notwithstanding the "damaging publicity" issued by the agency. *Accord, Miller* v. *Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *Bowman* v. *USDA*, 363 F.2d 81, 86 (5th Cir. 1966).

Although there is no basis on this record for reducing the amount of the civil penalty to be imposed because of respondents' financial condition, complainant does not object to the payment of the civil penalty over a period of years. Accordingly, the order will provide for payment of the $50,000 civil penalty over a period of 4 years.

No contention is made by respondents that complainant was required to prove actual injury or likelihood of injury in order to prove a violation of § 202(a) of the Act (7 U.S.C. § 192(a)), and the issue cannot be raised at this late date in this case. But since that issue is raised in *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986), also decided this day, the discussion of that issue in *Corn State* is set forth as Appendix C to this decision.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Holiday Food Services, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Nat Rocker, individually or as owner, officer or director of any packer subject to the Act, shall cease and desist from directly or indirectly giving or offering to give, or permitting or causing to be given money or anything of more than nominal value to, or for the benefit of, an officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence any such person to purchase or promote the purchase of meat, meat food products, poultry or poultry products from or through respondents.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby assessed, jointly and severally, a civil penalty of fifty thousand dollars ($50,000).

The cease and desist provisions of this order shall become effective as to each respondent on the day after service of this order on such respondent.

The civil penalty shall be paid at the rate of $12,500 per year by certified checks made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250, with the first check due not later than the 90th day after service of this order on respondents, and the remaining checks due on the same date of the next 3 years thereafter.

APPENDIX A

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974).

U.S.D.A. SANCTION POLICY

APPENDIX B

Petition for Rehearing filed in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984) (Note: This Petition for Rehearing is printed as an appendix to *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985))

APPENDIX C

Excerpt from *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (slip op. at 37-50) (May 8, 1986)

II. Proof of Injury or Likelihood of Injury Is Not Required in Commercial Bribery Cases.

[The excerpts in the appendixes above are omitted.—Ed.]

In re: OLE SALEM PACKING CO., INC., a corporation, and GREGORY H. MITCHELL, an individual, P&S Docket No. 6668. Decided May 9, 1986.

Packer—failure to pay full purchase price—Civil Penalty—Consent.

Roberta Swartzendruber, P&S Div., OGC, for complainant.
E. Bragg Williams, Poplarville, MS, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ole Salem Packing Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Mississippi. Corporate respondent's mailing address is P. O. Box 1018, Picayune, Mississippi 39466.

2. The corporate respondent, at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter and preparing meats for sale and shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Gregory H. Mitchell, hereinafter referred to as the individual respondent, is an individual whose business mailing address is P. O. Box 1018, Picayune, Mississippi 39466.

4. The individual respondent, at all times material herein, was:

(a) An owner, in combination with his wife, of all the corporate respondent's stock;

(b) President of the corporate respondent; and

(c) Responsible for the direction, management and control of the business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Ole Salem Packing Co., Inc., its officers, directors, agents, successors and assigns, and Gregory H. Mitchell, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby severally and jointly assessed a civil penalty of One Thousand Eight Hundred Dollars ($1,800.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: HARRY BRODY & SONS, INC., and HERBERT S. SMALL, P&S Docket No. 6575. Decided May 14, 1986.

Packer—inaccurate or incorrect weights—commercial bribery—Civil Penalty—Consent.

Ben Bruner, P&S Div., OGC, for complainant.
Ramsey Clark, New York, NY, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harry Brody & Sons, Inc., hereinafter referred to as corporate respondent, is a corporation which had its principal place of business at 3451 Frankford Avenue, Philadelphia, Pennsylvania. It is no longer in operation.

2. Corporate respondent at all times material herein was:

(a) Engaged in the business of manufacturing and preparing meat and meat food products for sale and shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. Herbert S. Small, hereinafter referred to as individual respondent, is an individual whose mailing address is 1209 Stratford Avenue, Melrose Park, Pennsylvania 19126.

4. Individual respondent at all times material herein was:

(a) President of the corporate respondent;

(b) Owner of 100% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent; and

(d) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Harry Brody & Sons, Inc., its officers, directors, agents and employees, and Herbert S. Small, directly or through any corporate or any device, in connection with the purchase, sale, or distribution of meat or meat food products, shall cease and desist from directly or indirectly;

1. Invoicing and collecting from the purchasers of livestock carcasses or parts thereof on the basis of inaccurate or incorrect weights;

2. Invoicing and collecting from the purchasers of livestock carcasses or parts thereof on the basis of a weight which includes trim weight without obtaining the purchasers' consent to the inclusion of trim weight in the invoice weight;

3. Attempting to enter into, continuing, cooperating in or carrying out any conspiracy, agreement, arrangement or understanding with any officer, agent, director, or employee of any customer or prospective customer which involves the offering or giving by respondent of any money or gift of more than nominal value to or for the benefit of any such officer, agent, director, or employee of the customer or prospective customer based upon or related to the purchase of livestock, meats or meat food products by such customer or prospective customer from respondent; and

4. Attempting to induce or cause, inducing or causing, accepting or receiving favored treatment or undue preference or advantage related to the purchase, sale, or marketing of meat or meat food products, in commerce, from any customer or prospective customer based on the offering or giving by respondent, its officers, agents, directors, employees, or brokers who represent it, of money or any gift or service of more than nominal value to or for the benefit of any customer, prospective customer, or their officers, agents, directors, or employees.

In accordance with section 203(b) of the Act (7 U.S.C § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of $20,000.00, which shall be held in abeyance, provided, however, that if respondents violate this order within five (5) years from its effective date, the full amount shall immediately become due and payable.

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: LINDEN PACKING CO., INC., P&S Docket No. 6536. Decided April 7, 1986.

Hooks & rollers not uniform—misrepresentation—mismanagement of monorail scale—inaccurate weights—Civil Penalty.

Peter Train, for complainant.
Raquel Romero, Elizabeth, NJ, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereinafter "the Act,"), that was instituted by a complaint and notice of hearing filed on May 8, 1985, which alleges that respondent engaged in unfair and deceptive trade practices in connection with its purchases of livestock.

The complaint alleges that during the period January 31, 1983 through December 29, 1983, respondent violated the Act (7 U.S.C. §§ 192(a) and 221) and regulations thereunder (9 C.F.R. §§ 201.73-1 and 201.99) when (1) it accounted and paid for livestock purchased on a carcass weight basis that included a tare which exceeded by five pounds the actual weight of the equipment (hooks and rollers) attached to the carcasses when weighed; (2) used hooks and rollers which were not uniform in weight; and (3) did not record the weight of the carcasses to the nearest minimum graduation on its scale.

Respondent filed an answer dated May 24, 1985, admitting the jurisdictional allegations of the complaint, but denying its commission of any violation. Subsequent to the holding of prehearing conferences and prehearing exchanges of proposed exhibits and wit-

ness lists, an oral hearing was held before me on December 3-4, 1985. Complainant was represented by Peter V. Train, Office of the General Counsel, United States Department of Agriculture, and respondent was represented by Raquel Romero, Weltchek, Prupis & Ritz, Elizabeth, New Jersey.

At the close of the oral hearing, a schedule for the filing of proposed findings of fact, conclusions, and supporting briefs was set. Briefing was completed on March 24, 1986.

Upon consideration of the entire record, briefs, and arguments, I have found that respondent did improperly account and pay for cattle on the basis of improper weighing practices. An order is being entered which directs respondent to cease and desist from such practices, specifies the manner in which respondent shall keep accounts and records in the future, and assesses a civil penalty against respondent of $20,000.00.

FINDINGS OF FACT

1. Respondent, Linden Packing Co., Inc., is a corporation which has a principal place of business at 324 Astor Street, Newark, New Jersey 07114.

2. Respondent is, and at all times material herein, was:

(a) engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) a packer within the meaning of and subject to the provisions of the Act.

3. Respondent has been in the meat packing business for over 30 years and its current Vice-President, Jack Rosenberg, is responsible for its day-to-day operations.

4. Respondent, at all times material herein, purchased a portion of its livestock on a carcass weight basis.

5. Respondent, at all times material herein, weighed its livestock purchases after their conversion into carcasses, on a Toledo monorail dial scale which depicted weights in one pound graduations, with odd numbers indicated by lines without numbers and even number indicated by both lines and numbers.

6. Respondent's plant, at all times material herein, employed a gravity dressing system in which carcasses travel on a gravity rail until they reach a washing station where they are cleansed by a pressure hose. They are then weighed on the Toledo monorail dial scale, after which they are moved into a cooler. Respondent considered installing automatic washing equipment which would have washed the carcasses after weighing, but was advised that this was not feasible due to the low water table of the land upon which the plant was built.

7. On February 9, 1968, after giving notice and considering comments by industry members and all interested persons, the Department of Agriculture, promulgated the following regulation (33 F.R. 2760-2763, 9 C.F.R. § 201.99(d)):

> "Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on the actual hot weights. The hooks, rollers and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare shall include only the weight of the equipment."

8. Departmental personnel, based upon the advice of the manufacturers of the Toledo monorail dial scale, have determined that it is reasonable to maintain the equipment in such condition that a variance of two ounces either above or below the average weight of a plant's hooks and rollers is the acceptable tolerance for its hooks and rollers to still be considered uniform in weight.

9. On May 19, 1982, Elizabeth Hughes, a marketing specialist for the Packers and Stockyards Administration, went upon respondent's premises and conducted a test of a sample of respondent's hooks and rollers which revealed that forty-two percent of those in the sample varied by more than two ounces from the average weight. She also observed that the tare setting on the scale was 20 pounds; whereas, the average weight of the hooks and rollers attached to carcasses when weighed, on the basis of those she sampled, should have been 14 pounds 12 ounces. She was advised that 5 pounds were added to the tare as a compensating deduction for the water added during the washing operation.

10. On May 20, 1982, a regional supervisor for the Packers and Stockyards Administration, sent respondent a letter by certified mail, return receipt requested, (Complainant's Exhibit 3) advising respondent:

> "Recently a survey was conducted at your plant to determine your firm's compliance with the Packers and Stockyards Act and regulations when buying livestock on a dressed weight basis.
>
> "During the survey, certain discrepancies were found and discussed with you.
>
> "You agreed to discontinue deducting five pounds for water when purchasing livestock on a dressed weight basis and to identify and keep captive enough hooks and rollers

for your weekly hot dressed weight purchases. These captive hooks must be standardized to plus or minus two ounces from their average weight and the tare on your scale set accordingly.

"It will also be necessary to record the number of livestock bought on a dressed weight basis in Section 5, Item 6, of your annual report.

"Please notify this office of the steps you are taking to implement the above requirements.

"If you have any questions, feel free to call this office at 201-246-0060."

11. Approximately one week subsequent to the May 20, 1982 letter, Ms. Hughes telephoned Mr. Rosenberg and inquired as to his actions to achieve compliance and he then advised that respondent would discountinue purchasing livestock on a dressed weight basis. A month later, Ms. Hughes spoke to Mr. Rosenberg by telephone again and he told her he had changed his mind and would continue to purchase livestock on a dressed weight basis; he was advised by Ms. Hughes that respondent would have to come into compliance.

12. Respondent's annual report for October 1, 1982 through September 30, 1983, reveals a blank space where the form requires a packer to identify its total livestock purchases during the period that were paid for on a dressed carcass basis.

13. On December 21, 1983, Vincent DiBernardo, an industrial specialist for the Packers and Stockyards Administration, went upon respondent's premises and conducted a test of a sample of respondent's hooks and rollers which revealed that sixty-five percent of those in the sample varied by more than two ounces from the average weight. He also observed that the tare setting on the scale was 20 pounds; whereas the average weight of the hooks and rollers attached to carcasses when weighed, on the basis of those he sampled, should have been 14 pounds 8 ounces.

14. In January of 1984, Ms. Hughes again went upon respondent's premises and again observed the tare setting to be 20 pounds and, believing it to be at least 5 pounds in excess of the weight of the hooks and rollers, she discussed the setting with Jack Rosenberg who told her he took 5 pounds additional tare to compensate for the water added to the carcasses when washed immediately prior to being weighed.

15. In the course of its purchase of livestock on a carcass weight basis, during the period January 31, 1983 through December 29,

1983, respondent customarily weighed carcasses with a tare setting that exceeded, by five pounds, the weight of the rollers and hooks attached to the carcasses; paid sellers and issued accountings to them based on such weights without informing them of this practice; and used hooks and rollers that were not uniform in weight. In respect to one seller alone, Fern Baker, from September 27, 1983 through December 29, 1983, respondent paid the seller $6,751.37 less than required by taking the five pound deduction for water in respect to its weighing of 1701 cattle carcasses.

16. During 1983, respondent's weighmaster always reported the individual carcass weights of livestock purchased on a carcass weight basis in terms of even numbers and never in terms of odd numbers.

17. As part of its annual report for the fiscal year that ended on September 30, 1983, respondent filed financial statements showing its sales for the year were just under 74 million dollars, its gross profits were over 3 million dollars, and its income before income tax was 1.5 million dollars.

CONCLUSIONS

1. (a) Respondent engaged in an unfair and deceptive practice and device in violation of 7 U.S.C. § 192(a) and 9 C.F.R. § 201.99, each time during the period January 31, 1983 through December 29, 1983, when it settled and made final payment for livestock purchased on a carcass weight basis that was not limited to the actual hot weights, but included as part of the tare, an additional five pounds for water and exceeded by that amount, the weight of the hooks, rollers and other equipment used in connection with respondent's weighing of the carcasses.

(b) Pursuant to 7 U.S.C. § 193(b), an order requiring respondent to cease and desist from continuing such violations is warranted and is being entered. Inasmuch as sellers were unaware of this practice, the fact that respondent had been given a prior warning but persisted in the practice, committed in excess of 1700 violations (see finding number 15, *supra*), and the fact that respondent's annual sales for the fiscal year which ended on September 30, 1983 was nearly 74 million dollars with a gross profit of over 3 million dollars, a civil penalty of $20,000.00 is also being assessed which will not affect respondent's ability to continue in business, and is well below the maximum amount that may be assessed under the Act's authorization of $10,000.00 per violation, but is sufficient to impress respondent with the gravity of the offense and the need for future compliance.

2. (a) Respondent further violated 7 U.S.C. § 192(a) and 9 CFR § 201.99, each time during the period January 31, 1983 through December 29, 1983, when it used hooks and rollers which were not uniform in weight.

(b) Pursuant to 7 U.S.C. § 193(b), an order requiring respondent to cease and desist from continuing such violations is warranted and is being entered, but inasmuch as the violations were technical in nature, the assessment of a civil penalty for these violations is not appropriate.

3. The practice of respondent's weighmaster of reporting all carcass weights on the basis of even numbers only, was not shown to have disadvantaged sellers any more than it did respondent and cannot be said to be in violation of the Act. The Departmental regulation cited by complainant (9 CFR § 201.73-1) applies to the weighing of drafts of livestock and not to dressed carcasses.

DISCUSSION

The gist of the violations committed by respondent was its unauthorized deduction of five pounds for the water that may have been added to the weight of carcasses when it cleaned them just before weighing. The Departmental regulation, promulgated only after considerable industry discussion to make intelligible the prices per pound packers quote to sellers, clearly prohibits any deduction from the actual weight of a carcass other than the actual weight of attached equipment; i.e., the hooks and rollers. Respondent would justify its practice on the basis of the low water table of the land where its plant is situated. It was advised by an engineer that, because of this fact, automatic washing equipment could not be installed because the sewers that service the plant would be caused to back up. However, respondent has not presented any evidence that, after it received a warning that its practices were in violation of the Act and the regulation, it was unable to use the existing pressure hose so as to cleanse the carcasses after, instead of before, weighing them. Moreover, other packers with similar problems have elected to buy livestock on the basis of live weights instead of carcass weights and respondent, at first, advised the investigator that it would switch to such purchasing practice. But, it later changed its decision and persisted in its practices despite actual knowledge that it was violating a Departmental regulation in implementation of the section of the Act that proscribes unfair and deceptive practices.

A civil penalty of $20,000.00 is warranted by respondent's wilful violations of the express language of the regulation when it persisted in adding five pounds to the tare on the carcass weights upon

which it paid sellers after it received express warnings and had promised to comply. This penalty is $5,000.00 less than the penalty recommended by complainant and reflects the fact that the charges respecting the weighmaster's practice of recording weights at the nearest even pound have been dismissed and that no civil penalty is being assessed for respondent's failure to use hooks and rollers of uniform weights which was a technical violation not shown to be of benefit to respondent at the expense of sellers.

Accordingly, the following Order is being entered.

ORDER

Respondent Linden Packing Co., Inc., its officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Failing to settle and make final payment for livestock purchased on a carcass weight basis on the actual hot carcass weight of such livestock;

2. Using hooks and rollers in the weighing of livestock purchased on a carcass weight basis that are not uniform in weight;

3. Using a tare when weighing livestock carcasses greater than the actual weight of the hooks, rollers, gambrels or other equipment being used during such weighing;

4. Operating any monorail scale owned or controlled by it unless the tare on such scale has been checked and the scale's tare has been correctly and properly adjusted prior to the start of each day's operations, and as often as necessary during each day's operations to ensure that the tare is proper;

5. Failing to maintain and operate any livestock or monorail scale owned or controlled by it in such a manner as to ensure accurate and correct weights;

6. Weighing livestock, livestock carcasses or parts thereof, or causing them to be weighed, at other than the true and correct weights; and

7. Accounting to and paying the sellers on the basis of inaccurate or incorrect weights.

Respondent Linden Packing Co., Inc., shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its operations subject to the Packers and Stockyards Act, including hot scale sheets, accounts of sale and purchase invoices showing the true and accurate hot weight of livestock purchased on a carcass weight basis.

Respondent Linden Packing Co., Inc., is assessed a civil penalty in the amount of $20,000.00, which shall be payable by certified check or money order to the Treasurer of the United States.

Respondent Linden Packing Co., Inc., shall deliver a copy of this Decision and Order to all of its personnel whose duties or responsibilities include, in whole or in part, the operation of its livestock and monorail scales, the weighing of livestock or livestock carcasses, and the accounting to and payment of the sellers of livestock.

This Decision and Order shall become final 35 days after service hereof, unless appealed within 30 days of service (9 CFR §§ 1.145(a), 1.142(c)).

A copy of this Order shall be served upon the parties.

[Decision and Order became final May 15, 1986—Ed.]

In re: SELECTED MEATS, INC., JOSEPH A. MEINDL and ROBERT D. HINDSLEY, P&S Docket No. 6430. Decided May 16, 1986.

Packer—issuing insufficent funds checks—failure to pay when due—custodial accounts—Civil Penalty—Consent.

Eric Paul, for complainant.
Virgil L. Beeler, Indianapolis, IN, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrative, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint as modified below and specifically admit the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Selected Meats, Inc., hereinafter referred to as the corporate respondent, is an Indiana corporation whose principal place of business is located in Kingsford Heights, Indiana, and whose mailing address is P.O. Box 471, Kingsford Heights, Indiana 46346.

2. The corporate respondent at all times material herein prior to the suspension of livestock purchase operations on May 3, 1984, was:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. The corporate respondent's average annual purchases of livestock prior to May 3, 1984, exceed $500,000.00.

4. Joseph A. Meindl, hereinafter referred to as respondent Meindl, is and at all times material herein was:

(a) An individual whose address is 906 East 20th Street, La Porte, Indiana;

(b) President of the corporate respondent;

(c) Owner of at least a 55 percent interest in the corporate respondent's outstanding stock; and

(d) In combination with respondent Hindsley, responsible for the direction, management and control of the operation of the corporate respondent.

5. Robert D. Hindsley, hereinafter referred to as respondent Hindsley, is and at all times material herein was:

(a) An individual whose address is 6256 South Range, R.R. #3, La Porte, Indiana 46350;

(b) Vice President of the corporate respondent until at least April 30, 1984;

(c) Owner of a 45 percent interest in the corporate respondent's outstanding stock until at least April 30, 1984;

(d) In combination with respondent Meindl, responsible for the direction, management and control of the operation of the corporate respondent;

(e) Engaged in the business of buying and selling livestock in commerce for his own account; and

(f) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

In re: HARRY P. REDMAN, P&S Docket No. 6613. Decided May 20, 1986.

Dealer—failure to meet bonding requirements—Suspension—Consent.

Eric Paul, for complainant.
Donald G. Beattie, Altoona, PA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harry P. Redman, doing business as Redman & Son, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 435, Mitchellville, Iowa 50169.

2. The respondent is, and at all times material herein was;

(a) Engaged in the business of buying livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Harry P. Redman, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of five (5) years and thereafter until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the five (5) year period.

The provisions of this order shall become effective on the sixth day after service of this decision of the respondent.

Copies of this decision shall be served on the parties.

In re: RICHARD TODD, P&S Docket No. 6664. Decided May 21, 1986.

Dealer—failure to meet bonding requirements—Suspension—Civil Penalty—Consent.

Eric Paul, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Richard Todd, doing business as Circle T Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is Box 147, Afton, Oklahoma 74331.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Richard Todd, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand One Hundred Dollars ($2,100.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: ROYAL CREST MEATS, INC., P&S Docket No. 6643. Decided April 15, 1986.

Packer—failure to comply with bonding requirements—cease and desist—Civil Penalty—Default.

Eric Paul, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

(c) Respondent's average annual purchases of livestock exceed $500,000.00.

2. The Packers and Stockyards Administration notified respondent by certified mail on August 20, 1985, that the $10,000.00 surety bond it maintained to secure the performance of its livestock obligations under the Act would terminate on October 29, 1985. Respondent was further informed that if it continued to buy livestock in commerce for purposes of slaughter without bond coverage or its equivalent, it would be in violation of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to buy livestock in commerce for purposes of slaughter without filing and maintaining a reasonable bond or its equivalent.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Royal Crest Meats, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a packer, shall cease and desist from engaging in the business of a packer, in commerce, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00)

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on May 26, 1986.—Ed.]

In re: CHARLES RAY STAFFORD and ROBERT E. STAFFORD, P&S Docket No. 6445. Decided May 29, 1986.

Dealer—market agency—failure to meet bonding requirements—Civil Penalty—Consent.

Peter Train, P&S Div., OGC, for complainant.
Kent O. Hyde, Springfield, MO, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C., Section 181 *et seq.*) by a Complaint filed by the Administrator,Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR, Section 201.1 *et seq.*). This Decision is entered pursuant to the consent Decision provisions of the Rules of Practice applicable to this proceeding (7 CFR, section 1.138).

The respondents admit the jurisdictional allegations in Paragraph I of the Complaint, and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Charles Ray Stafford and Robert E. Stafford, hereinafter referred to as "Respondents," are partners doing business as Stafford Brothers. Their business mailing address is 1323 West Locust, Springfield, Missouri 65803.

2. Respondents are, and at all times material herein were:

(a) Engaged in business as a dealer, buying and selling livestock in commerce for their own account and as a market agency to buy livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account and as a market agency to buy livestock on a commission basis.

CONCLUSIONS

The Respondents, having admitted the jurisdictional facts, and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondents, Charles Ray Stafford and Robert E. Stafford, their agents and employees, directly and through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents have filed and presently maintain the reasonable bond or its equivalent as required by the Act and regulations and therefore no suspension of their registration is warranted. That Respondents are hereby assessed a civil penalty in the amount of One Thousand and No/100 ($1,000.00) Dollars, which has been paid and receipt acknowledged in open court.

The provisions of this Order shall become effective on the sixth day after service of this Order on the Respondents.

Copies of this Decision shall be served upon the parties.

In re: WESTERN STOCKYARDS CORPORATION, P&S Docket No. 6680. Decided May 30, 1986.

Market agency—custodial account—misuse of funds—Suspension—Civil Penalty—Consent.

John J. Casey, P&S Div., OGC, for complainant.
Daniel Olsen, Kansas City, MO, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Western Stockyards Corporation admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of

settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Western Stockyards Corporation, hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Texas. It is doing business as Amarillo Livestock Auction Company, and as Amarillo Cattle Company, with a principal place of business located at Amarillo, Texas, and a mailing address of 100 S. Manhattan, P.O. Box 30668, Amarillo, Texas.

2. Respondent among other things is, and at all times material herein was:

a. Engaged in the business of conducting and operating the Amarillo Livestock Auction Company stockyard, a posted stockyard under the Act;

b. Engaged in the business of selling livestock on a commission basis; and

c. Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Western Stockyards Corporation, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds of Amarillo Livestock Auction Company, within the time and in the amounts prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts equal to proceeds receivable from sales of consigned livestock;

2. Transferring funds, from the same custodial account to their general account, in excess of lawful charges and sums due to respondent as authorized by section 201.42(d) of the regulations (9 CFR § 201.42(d)); and

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of net proceeds to the owners, con-

signors or shippers of such livestock, or for payment of amounts due the respondent for lawful marketing charges.

Respondent Western Stockyards Corporation is suspended as a registrant under the Act for a period of two (2) weeks, beginning July 6 and ending July 19, 1986, and thereafter until such time as it demonstrates that the shortage in the Custodial Account for Shippers' Proceeds of Amarillo Livestock Auction Company has been eliminated. When respondent Western Stockyards Corporation demonstrates that the shortage in the custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the two-week period.

Respondent Western Stockyards Corporation is hereby assessed a civil penalty in the amount of twenty-five thousand dollars ($25,000.00), to be paid by check delivered to the attorney for complainant, payable to the United States Treasury, on or before July 7, 1986.

The provisions of this order shall become effective upon service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CIRCLE B. MEAT CO., INC., d/b/a FLORIDA BONELESS BEEF and CIRCLE B. PORTION MEAT CO., GEORGE E. MUELLER, SR., and JAY A. MUELLER, P&S Docket No. 6614. Decided April 25, 1986.

Packer—issuing insufficient funds checks—inventories—dissipation of trust assets—failure to pay when due—Civil Penalty—Default.

Allan Kahan, for complainant.
Robert L. Williams, Venica, FL, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO CIRCLE B. MEAT CO., INC., AND GEORGE A. MUELLER, SR., UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the

Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents Circle B. Meat Co., Inc., and George A. Mueller, Sr., have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing pertaining to respondents Circle B Meat Co., Inc., and George A. Mueller, Sr., which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Circle B Meat Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of Florida, doing business as Florida Boneless Beef and Circle B Portion Meat Co. Its business mailing address is P. O. Drawer 412, Dade City, Florida 34297.

(b) The corporate respondent was, at all times material herein:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter;

(2) Engaged in the business of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(3) A packer within the meaning of the Act and subject to the provisions of the Act.

(c) George E. Mueller, Sr., hereinafter referred to as respondent George Mueller, is an individual whose mailing address is Box 044, Bushnell, Florida 33513.

(d) Respondent George Mueller is, and at all times material herein was:

(1) Vice-President and a director of the corporate respondent; and

(2) Responsible for the management, direction and control of the practices and activities of the corporate respondent.

(e) Respondent George Mueller was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

2. As of January 3, 1984, the corporate respondent's financial condition failed to meet the requirements of the Act. On said date, the corporate respondent filed a Chapter XI Petition in the United States Bankruptcy Court for the Middle District of Florida.

3. (a) The corporate respondent, under the management, direction and control of respondent George Mueller, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and at divers other times, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of August 1, 1985, there remained unpaid by respondents approximately $130,399.30 for such livestock purchases.

4. The corporate respondent, under the management, direction and control of respondent George Mueller, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph IV of the Complaint and Notice of Hearing, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

5. The corporate respondent, under the management, direction and control of respondent George Mueller, failed to hold in trust and wilfully dissipated inventories of meat and meat food products which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that:

(a) On January 6, 1984, respondents sold 4860 pounds of 50/50 beef trim to Swift & Co., Orlando, Florida for $1,980.00. The proceeds from said sale were distributed by respondents to Sam Cohen, United Telephone and M&M Cattle. The payments constitute dissipations of trust assets.

(b) On January 20, 1984, respondents sold 9000 pounds of 50/50 beef trim to Swift & Co., Orlando, Florida for $3,960.00. Respondents used the proceeds from said sale to make payments to U.S. Leasing, United Telephone, Sumter Electric, and Grafton & Sons, Inc., made two loan payments totaling $417.75, and obtained $1,290.66 in currency, the disposition of which is unaccounted for. The payments constitute dissipations of trust assets.

6. The corporate respondent, under the management, direction and control of respondent George Mueller, failed to hold in trust inventories of livestock which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that, during the period October 24, 1983, through December 12, 1983, respondents purchased 67 head of livestock from Jacksonville Livestock Auction Company, Inc., Whitehouse, Florida, and North Florida Farmers Livestock Market, Inc., Lake City, Florida for $7,847.56. Respondents' records contain no indication of the slaughter or other disposal or disposition of this livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the corporate respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Findings of Fact 3 and 4 herein, respondents Circle B Meat Co., Inc., and George Mueller wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Findings of Fact 5 and 6 herein, respondents Circle B Meat Co., Inc., and George Mueller wilfully violated sections 202(a) and 206(b) of the Act (7 U.S.C. §§ 192(a), 196(b)).

ORDER

Respondent Circle B Meat Co., Inc., its officers, directors, agents and employees, and respondent George E. Mueller, Sr., directly or through any corporate or other device, in connection with their operations as a packer, shall cease and desist from:

1. Purchasing livestock while insolvent, i.e., while current liabilities exceed current assets, unless the respondents pay the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or wire transfer;

2. Failing to pay or failing to pay, when due, for livestock;

3. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks when presented;

4. Engaging in any act or practice for the purpose of converting to their own personal use or gain assets required to be held in trust for the benefit of unpaid cash sellers of livestock; and

5. Failing to hold in trust livestock purchased in cash sales and all inventories of or receivables or proceeds from meat, meat food products or livestock products derived therefrom required to be held in trust for the benefit of unpaid cash sellers of livestock, pursuant to section 206(b) of the Packers and Stockyards Act (7 U.S.C. § 196(b)), until full payment of the amounts due under the trust have been received by such unpaid

In re: COUNTRY CUTS OF IOWA, INC., DAVID F. OLSON, LUTHER GESME, JACK L. WARD and RICHARD HOBSON, P&S Docket No. 6515. Decided June, 6, 1986.

Packer—failure to pay full purchase price—commercial bribery—Civil Penalty—Consent.

Ben Bruner, P&S Div., OGC, for complainant.
William Kevin Stoos, Sioux City, IA, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Country Cuts of Iowa, Inc., hereinafter referred to as respondent Country Cuts, is a corporation under the laws of the State of Iowa with its principal place of business in Sioux City, Iowa. The business mailing address of the corporation is 525 Chambers Street, Sioux City, Iowa 51101.

2. Respondent Country Cuts, at all times material herein was:

(a) Engaged in the business of manufacturing and preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. David F. Olson, hereinafter referred to as respondent Olson, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

4. Respondent Olson, at all times material herein, was:

(a) Secretary and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

(c) President and a member of the Board of Directors of Mid-America Lamb Processing, Inc., hereinafter referred to as Mid-America; and

(d) Owner of 12.1% of the outstanding stock of Mid-America.

5. Luther Gesme, hereinafter referred to as respondent Gesme, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

6. Respondent Gesme, at all times material herein, was:

(a) Treasurer and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

(c) Vice President and a member of the Board of Directors of Mid-America; and

(d) Owner of 12.1% of the outstanding stock of Mid-America.

7. Jack L. Ward, hereinafter referred to as respondent Ward, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

8. Respondent Ward, at all times material herein, was:

(a) Vice President and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts;

(c) Secretary-Treasurer and a member of the Board of Directors of Mid-America; and

(d) Owner of 14.0% of the outstanding stock of Mid-America;

9. Richard M. Hobson, hereinafter referred to as respondent Hobson, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

10. Respondent Hobson, at all times material herein, was:

(a) President and a member of the Board of Directors of respondent Country Cuts; and

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

11. Respondents Olson, Gesme, Ward and Hobson, acting in concert, at all times material herein were responsible for the direction, management and control of respondent Country Cuts.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Country Cuts of Iowa, Inc., David F. Olson, Luther Gesme, Jack L. Ward and Richard Hobson, their officers, directors agents, employees, successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from

1. Failing to pay the full purchase price of meat;

2. Engaging in the practice of making unduly or unreasonably preferential payments to any person or subjecting any person to any undue or unreasonable prejudice or disadvantage in connection with meat or meat food products purchased in commerce.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Olson, Gesme, Ward and Hobson are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties. Country Cuts of Iowa, Inc.

In re: DOUGLAS B. GRANT, an individual, and GRANT LIVESTOCK INC., a corporation, P&S Docket No. 6570. Decided April 25 1986.

Dealer—failure to meet bonding requirements—insolvency—issuing insufficient funds checks—failure to pay full purchase price—prohibited from engaging in business while insolvent—Default.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the re-

spondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Douglas B. Grant, hereinafter referred to as the respondent, is an individual whose business mailing address is 1115 West Green Street, Cheraw, South Carolina 29520.

(b) The individual respondent at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account;

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

(3) Doing business under the name of the corporate respondent, Grant Livestock, Inc.;

(4) President of and 100% stockholder of the corporate respondent; and

(5) Responsible for the direction, management and control of the corporate respondent.

(c) Grant Livestock, Inc., hereinafter referred to as the corporate respondent, is engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

(d) The corporate respondent is not registered with the Secretary of Agriculture in any capacity subject to the Act.

2. During the period January through August 1984, respondents engaged in business as a dealer buying and selling livestock in commerce for their own account without having and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

3. (a) As of January 31, 1985, the individual respondent had current liabilities totalling $75,579.73 and no current assets. As of January 31, 1985, the corporate respondent had current liabilities of $57,099.03 and no current assets.

(b) The individual respondent's and corporate respondent's current liabilities presently exceed their current assets.

4. Respondents, in connection with their business as a dealer, on or about the dates and in the transactions set forth in paragraph

IV of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

5. (a) Respondents, on or about the dates and in the transactions specified in paragraph IV and in the transactions specified in paragraph V of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of July 1, 1985, there remained unpaid by the respondents a total of $60,959.73 for such livestock purchases.

6. Respondents, in connection with their business subject to the Act, failed to keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business, in that respondents failed to keep and maintain a record of accounts payable and accounts receivable, buyer's bills, seller's invoices, all bank statements and cancelled checks and all records of their assets and liabilities.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondents' financial condition does not meet the requirements of the Act (7 U.S.C. 204).

By reason of the facts found in Findings of Fact 4 and 5 herein, the respondents have wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b).

By reason of the facts found in Finding of Fact 6 herein, respondents have violated section 401 of the Act (7 U.S.C. 221).

ORDER

The individual respondent, directly or through any corporate or other device, and the corporate respondent, its officers, directors, agents, employees successors and assigns, in connection with their business subject to the Act shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the ac-

count upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

The respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including a record of accounts payable and accounts receivable, buyer's bills, seller's invoices, all bank statements and cancelled checks and all records of their assets and liabilities.

Individual respondent Grant is suspended as a registrant under the Act for a period of six months and thereafter until he demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements of the Act and regulations. When the individual respondent demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the six month period.

Corporate respondent Grant Livestock, Inc., is prohibited from operating subject to the Act for a period of six months and thereafter until it demonstrates that it is no longer insolvent and that it is in full compliance with the bonding requirements of the Act and regulations. When the corporate respondent demonstrates that it is no longer insolvent and that it is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating the prohibition after the expiration of the six month period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[Decision and Order became final on June 7, 1986.—Ed.]

In re: CELIVO NICK FARINELLI, JR. P&S Docket No. 6642. Decided April 24, 1986.

Market agency—insolvency—issuing insufficient funds checks—failure to pay when due—Suspension—Default.

Andrew Stanton, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent's financial condition does not meet the requirements of the Act and that the respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Celivo Nick Farinelli, Jr., hereinafter referred to as respondent, is an individual whose business mailing address is 10018 No. Alves Road, Ballico, California 95303.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce for his own account.

2. (a) On July 22, 1985, respondent filed with the United States Bankruptcy Court, Eastern District of California, a voluntary petition pursuant to Chapter 7 of the Bankruptcy Act, which indicates

that respondent had current assets of $4,000.00 and current liabilities of $97,669.00, resulting in an excess of current liabilities over current assets in the amount of $93,669.00.

(b) Respondent's current liabilities presently exceed his current assets.

3. (a) Respondent, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, in connection with the purchase of livestock, issued checks which, when presented for payment, were not paid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the accounts upon which such checks were drawn.

(b) Respondent, on or about the dates and in the transactions set forth in paragraphs III(a) and (b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) In connection with the livestock transactions set forth in paragraphs III(a) and (b) above, there remains unpaid a total of $31,295.80.

4. In connection with the transactions set forth in paragraph III of the complaint, and on or about the transactions set forth in paragraph IV of the complaint, respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock.

5. Respondent, in connection with his operations as a dealer, during the period April 1, 1985, through August 15, 1985, failed to create, keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions subject to the Act and regulations, in that respondent failed to create, keep and maintain fully completed purchase and sales invoices.

CONCLUSIONS

ORDER

Respondent Farinelli, individually or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Act, including fully completed purchase and sales invoices.

Respondent Celivo Nick Farinelli, Jr., is suspended as a registrant under the Act for a period of five (5) years, provided, however, that a supplemental order will be issued terminating this suspension at any time after the expiration of 45 days upon demonstration by respondent that all livestock sellers have been paid in full, provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant or packer after the expiration of the 45 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[Decision and Order became final on June 11, 1986.—Ed.]

In re: JOHN A. SCHOLL, P&S Docket No. 6684. Decided June 13, 1986.

Bonding required—suspended—Civil Penalty—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administra-

tor, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John A. Scholl, hereinafter referred to as the respondent, is an individual whose business mailing address is 218 H West Route 313, Perkasie, Pennsylvania 18944.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent John A. Scholl, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: OWEN A. BOARDMAN, P&S Docket No. 6694. Decided June 13, 1986.

Maintain adequate bond—suspended—Civil Penalty—Consent.

Ben E. Bruner, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Owen A. Boardman, doing business as 81 Hog Company, hereinafter referred to as the respondent, is an individual whose business mailing address is 1601 So. 1st Avenue, Norfolk, Nebraska 68701.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Owen A. Boardman, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Five Hundred Dollars ($1,500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

ment of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jay Rippy, Inc., doing business as Cattleman's Livestock Commission Co., hereinafter referred to as the respondent, is a corporation incorporated under the laws of Texas, whose business mailing address is Highway 54, Dalhart, Texas 79022.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Cattleman's Livestock Commission Co. stockyard, a stockyard posted under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a dealer buying and selling livestock in commerce for its own account, and a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jay Rippy, Inc., its agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: RICHARD N. GARVER. P&S Docket No. 6449. Decided June 19, 1986.

Insufficient funds checks—Failure to pay when due—Suspension of registration.

The Judicial Officer affirmed that part of Chief Judge Campbell's order requiring respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks, and suspending respondent's registration for 2 years and thereafter until he is no longer insolvent, but reversed that part of the order holding all but 30 days of the suspension period in abeyance. The fact that insufficient funds checks were issued when the bank lawfully and unilaterally terminated respondent's over-draft protection without notice is not a defense. A violation is willful if respondent intentionally does an act which is prohibited, or acts with careless disregard of statutory requirements. The test of insolvency is whether current liabilities exceed current assets. Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. The failure to pay promptly and in full for livestock and the issuance of insufficient funds checks violate sections 312(a) and 409 of the Act. Severe sanction policy explained. To permit respondent to continue in the livestock industry after a 30-day active suspension period would seriously undercut the deterrent value of the 2-year suspension order. The fact that respondent's creditors would receive a token repayment of the indebtedness if he remains in business is outweighed by the national interest in having fair and competitive conditions in the livestock industry.

Peter V. Train, for complainant.
Thomas R. Smith, for respondent.
John A. Campbell, Chief Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on January 29, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) ordering respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks. The order also suspends respondent's registration for 2 years and thereafter until he is no longer insolvent, except that all but 30 days of the suspension period is held in abeyance.

On March 4, 1986, complainant, seeking to eliminate that portion of the order holding the suspension order in abeyance, appealed to

* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On April 21, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, I agree with complainant's position on appeal. The ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize, except that the provisions of the order holding the suspension order in abeyance are eliminated, together with the ALJ's reasons therefor. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereafter referred to as the "Act", instituted by a complaint filed on November 8, 1984, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint charges that the respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204) and that he willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by issuing nonsufficient funds checks and failing to pay, when due, for livestock.

Respondent filed an answer on January 2, 1985, in which he admitted all but one of the material allegations of the complaint. An oral hearing was held in Cincinnati, Ohio on September 18, 1985. Respondent was represented by Thomas R. Smith, Esq., and complainant was represented by Barbara S. Harris of the Office of the General Counsel. At the close of the hearing the time was set for the filing of briefs.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 405c-405g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

FINDINGS OF FACT [1]

1. Richard N. Garver, hereafter referred to as the respondent, is an individual whose business mailing address is 9226 Hiner Road, Wooster, Ohio 44691.

2. The respondent, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. As of September 30, 1984, the respondent's current liabilities exceeded his current assets.

4. Respondent's current liabilities presently exceed his current assets.

5. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

DATE OF CHECK (1984)	CHECK ISSUED TO	NO. OF HEAD	AMOUNT OF CHECK
9/22	Paul Stewart	75	27,454.61
9/22	Marietta Livestock Sales	28	9,907.15
9/17	Scio Livestock Auction	11	3,407.96
9/23	Scio Livestock Auction		1,319.27
9/15	Bill Martin		36,084.40
9/18	Producer's Lvsk. Assoc.	132	67,369.99
9/24	Producer's Lvsk. Assoc.	215	130,063.83
9/18	Producer's Lvsk. Assoc.	44	32,932.47
9/19	Producer's Lvsk. Assoc.	45	32,277.67
9/19	Producer's Lvsk. Assoc.	128	64,061.78
9/24	Producer's Lvsk. Assoc.	211	141,303.32
9/15	Athens Livestock	40	12,213.97
9/15	Jerry Caldwell	163	45,231.54
9/20	Jerry Caldwell	274	73,271.71

6. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below and in Finding of Fact No. 5, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

[1] Findings 1 through 7, accepted as accurate by respondent, are restated herein. Findings 8, 9, and 10 were proposed by respondent and are included herein, along with my additional findings 11 through 16.

1984 DATE OF PURCHASE	PURCHASED FROM	AMOUNT	NO. OF HEAD
9/24	Carrollton Livestock Auction	5,086.65	14
9/17,19	Muskingum Livestock Sales	19,408.10	58
9/22	Paul Stewart	32,451.65	97
9/8,15,22	Barnesville Livestock	15,794.76	92
9/20	Chickasaw Stock Yard	4,082.04	10
	Scio Livestock Auction	2,177.38	
9/21	Livestock Market of Spencer	7,299.35	20
9/3,10,11	Bill Martin	202,460.18	432
9/11,18	Roger Taylor	31,609.50	82
8/10	Athens Livestock	1,239.00	1
9/15	Athens Livestock	9,199.50	26
9/22	Athens Livestock	8,717.11	26
9/22	United Livestock Sales Co.	23,306.87	64
9/24	Jerry Caldwell	13,705.88	55

7. As of September 18, 1985, there remained unpaid a total of at least $700,000.00 for such livestock purchases set forth in Findings of Fact Nos. 5 and 6.

8. For ten (10) years prior to September, 1984, respondent had a business arrangement with his bank under the terms of which the bank honored all overdrafts on his account and charged respondent a fee established by the bank for doing so.

9. At the time that respondent issued the checks identified in Finding No. 5, the arrangement with the bank was in full force and effect and respondent had no reason to believe that the checks would not be honored by his bank.

10. Respondent did not provide checks to persons from whom he had purchased cattle knowing that those checks would be returned because of insufficient funds.

11. Respondent's bank arrangement, noted in Findings 8 and 9, whereby the bank would pay for respondent's overdrafts, was secured by property. When the property was sold there was no longer any collateral to secure respondent's line of credit, and the bank terminated the agreement.

12. Respondent's bookkeeping methods were archaic if not primitive. He maintained no records of accounts receivable and, consequently, had no way of knowing how much he was owed or by whom. For example, respondent testified that it was his custom to visit his bookkeeper once a month, taking all of his bills, sales slips, and bank statements to her in a grocery bag.

13. Since early 1985, respondent has been working as a commissioned buyer of livestock for Elden Ginn who operates a stockyard

and sells cattle on a commission basis only. In order to have respondent work for him, it was necessary for Mr. Ginn to increase his own bond from $55,000.00 to $100,000.00.

14. Under respondent's arrangement with Ginn, respondent is paid $275.00 per week for salary and expenses. All commissions earned by him are segregated and (except for taxes, a $100.00 per month payment to Ginn's bookkeeper, and respondent's $275.00 salary) are distributed to respondent's creditors quarterly. The arrangement is contained in respondent's Exhibit No. 1. Respondent acts purely as an agent for Ginn and has no access to funds.

15. At the time of the hearing (September 18, 1985), approximately $4,800.00 had been distributed to creditors under the arrangement with Ginn and it was expected that approximately $6,000.00 more would be paid within several weeks of the hearing.

16. Respondent had not been suspended under the Act prior to this proceeding.

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. By reason of the above findings of fact, it is concluded that respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204), and that respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by failing to pay, when due, and by issuing nonsufficient funds checks, for livestock. The order proposed by complainant is issued. . . .

WILLFUL VIOLATIONS OF THE ACT

Complainant correctly contends that respondent's failure to pay for livestock and respondent's issuance of nonsufficient funds checks were willful violations of Sections 312(a) and 409 of the Act.

Respondent admits such practices but argues that his relationship with his bank and the over-draft protection the bank extended to him demonstrate that he did not willfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's overdraft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.

A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally terminated

his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail. As stated in *In re Thumb Auction Markets, Inc.*, 37 A.D. 164, 167-168 (1977). "Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements. . . ."

Decisions under the Act and regulations have established that a line of credit or over-draft protection extended by a bank is no defense to a charge of insolvency or custodial account violations. *In re Thumb Auction Markets, Inc., supra; In re Hugh B. Powell,* 41 A.D. 1354, 1360 (1982); *In re Sechrist Sales Co.,* 36 A.D. 665, 668, 670-75 (1977); *In re Harry Hardy,* 33 A.D. 1383, 1401 (1974). Similarly, over-draft protection cannot be a defense to a charge of issuing insufficient funds checks.

A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182, 185, 187 (1973); *Goodman* v. *Benson,* 286 F.2d 896, 900 (CA 7 1961); *In re Miller,* 33 A.D. 53, 83-87, *aff'd sub nom., Miller* v. *Butz,* 498 F.2d 1088 (CA 5 1974); *In re Lufkin Livestock Exchange, Inc.,* 27 A.D. 596, 609 (1968).

Here, the practices engaged in by respondent must be characterized as willful.

Respondent operated completely in the dark regarding the financial condition of his business. He maintained no record of his sales and hence did not know who owed him or how much he was owed. He relied solely on a credit arrangement with a bank to pay his over drafts, and then sold the property which was the collateral for the credit arrangement. This state of affairs led to the respondent's failure to pay for livestock and his issuance of nonsufficient funds checks. At the very least respondent's actions and course of conduct were in careless disregard of the requirements of the Act.

On fourteen separate occasions, respondent issued checks in purported payment for livestock which were returned for nonsufficient funds in his account. In another fourteen transactions, respondent admits that he failed to give his sellers payment for the livestock he purchased. The failure to pay promptly and in full for livestock and the issuance of "nonsufficient funds" checks have been held to violate Sections 312(a) and 409 of the Act. *Lewis* v. *Butz,* 512 F.2d 681, 682-83 (CA 8 1975); *In re Bryan,* 36 A.D. 37, 42 (1977); *In re Mid-States Livestock, Inc.,* 37 A.D. 547, 561-562 (1977), *aff'd sub nom Van Wyk* v. *Bergland,* 570 F.2d 701, 704-705 (CA 8 1978); *In re Trenton Livestock, Inc.,* 41 A.D. 1965 (1982); *In re Edzards,* 37 A.D. 1880, 1887 (1978).

In addition, respondent admitted that as of September 30, 1984, his current liabilities exceeded his current assets and that as of the date of the filing of the complaint, his current liabilities also exceeded his current assets. Under the Act, the principal test of insolvency is whether current liabilities exceed current assets. This test has been reviewed and affirmed by the Fifth Circuit in *Bowman* v. *United States,* 363 F.2d 81 (CA 5 1966).

Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. *In re Hugh B. Powell, supra,* at 1359-1360; *In re Donald Hageman,* 42 A.D. 531, 539-540 (1983).

Because repondent was insolvent on September 30, 1984 and November 8, 1984, it is clear that he failed to meet the financial requirements of the Act. (7 U.S.C. § 204).

SANCTION

Respondent does not contest the factual allegations of the complaint. His sole argument is directed to the proposed sanction sought by the complainant. The complainant requests that respondent be ordered to cease and desist from the practices alleged and that he be suspended for a period of two years and thereafter until he demonstrates his insolvency.

Complainant urges at page 6 of its brief:

> In 1976, Congress recognized the importance of assuring livestock producers prompt payment for the livestock they sell by amending the Packers and Stockyards Act to include section 409 (7 U.S.C. § 228b). This section, which embodies the prompt payment provisions, was enacted to insure financial integrity in the livestock industry and to prevent economic disaster to livestock sellers (Tr. 10). So crucial is the requirement of prompt payment to the financial stability of the livestock industry, a cash basis industry, that Congress uniformly imposed it on all persons subject to the Act's jurisdiction.
>
> The testimony at the oral hearing was unequivocal and extensive that due to the congressional mandate set forth above, the Packers and Stockyards Administration considers violation of the prompt payment provisions of section 409 to be very serious (Tr. 12, 13). Mr. Brinckmeyer testified that these practices are damaging to the individual market agency, dealer or producer who does not receive timely payment, and damaging to the industry as a whole. (Tr. 11).

Further, the Judicial Officer has held repeatedly that it is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department. This policy has been adopted in order to serve as an effective deterrent to the respondent as well as to other potential violators. *In re Braxton M. Worsley*, 33 A.D. 1547, 1556-1561 (1974). The Judicial Officer has also stated that the recommendation of the administrative officials with respect to the sanction is to be given great weight since they administer the program on a daily basis and are in the best position for observing whether the sanctions imposed serve as an effective deterrent to future violations by respondents and others. *In re Worsley, supra,* at 1568.

In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALJ recognized the "enormity of the violations" (Initial Decision at 12), which "clearly warranted" the 2-year suspension order requested by complainant (Initial Decision at 11). Nonetheless, he held all but 30 days of the suspension period in abeyance for the following reasons (Initial Decision at 11-13):

> In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances. At the same time, some consideration should be given to respondent's plea that an order be formulated permitting respondent to continue in the livestock industry with the safeguards that are presently in place. This I believe is possible within the framework of the sanction proposed by complainant.
>
> A modification appears appropriate for several reasons. Respondent was not subject to prior suspensions nor was there any indication of an intent to defraud his creditors. His faults lay in his failure to establish good accounting practices and blind reliance on a credit arrangement with his bank. These failings appear to be remedied through his present arrangement with his employer, Elden Ginn (Findings 13 and 14, and respondent's Exhibit 1). Further, under such arrangement, respondent's creditors receive a token repayment of the indebtedness. (Findings 14, 15). While such payment is no defense to the violations of the Act

credit.[2] He explained that he bought animals on a live weight basis, e.g., paying $500 for an animal, and sold it on a dressed weight basis. He would call the packer on a given day and the packer would tell him what price would be paid for choice cattle delivered at the plant the following day. Respondent would then purchase the livestock himself (or through the 15 buyers purchasing livestock for him on a commission basis) on a live weight basis, and sell it on a grade and yield basis. If he or the other buyers estimated incorrectly the grade that would be determined after slaughter or the number of dressed weight pounds that would be produced from the livestock, respondent would likely lose money on the transaction. Since respondent lost about $700,000 from his grade and yield transactions, either he and his buyers were very inept at buying livestock that would be profitable at the price being paid by the packer, or he was taking too much profit from the business. (For our purposes, it makes no difference which explanation is correct.)

Although respondent was admittedly a very poor bookkeeper, and kept no accounts receivable records, he took all of his records to his bookkeeper once a month. No matter how poor respondent's bookkeeping system was, it would not be possible for him to be short $700,000 without knowing that he was operating in the red. Accordingly, I infer that respondent knew for a considerable period of time that he was operating in a manner that exposed the persons selling livestock to him to great risk.[3] *Cf. Zwick* v. *Freeman*, 373 F.2nd 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967), in which the court said with respect to a failure to pay case under the Perishable Agricultural Commodities Act:

> As there was a series of 295 transactions which occurred over a period of several months and which involved a deficit in excess of a quarter of a million dollars, it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clear-

[2] The bank's action in withdrawing respondent's line of credit did not cause his loss of at least $700,000, but merely exposed his insolvent condition.

[3] Respondent was not asked whether he knew that he had been operating in the red for a considerable period of time. He testified that he assumed that the bank would continue to honor overdrafts, but, as stated above, he was depositing enough money into his checking account from his livestock sales so that his account was overdrawn on only one day during August and September 1984, even though he was at least $700,000 in the red at the time.

er examples of "flagrant" violations of the statute than were exemplified by petitioner's conduct.

If, on the other hand, respondent were to contend that he w totally oblivious to the fact that he was operating heavily in t red, when, in fact, he was short approximately $700,000 in his liv stock business, that would be such reckless conduct that it wou demonstrate a total lack of regard for the legislative requiremen that he pay promptly and in full for his livestock purchases.

Hence under any view of the situation, respondent's failures pay for over $700,000 worth of livestock constitute flagrant viol tions of the Act warranting a most severe sanction.

It is the policy of this Department to impose severe sanctions fo serious or repeated violations of any of the regulatory programs a ministered by the Department to serve as an effective deterrer not only to the respondents, but also to other potential violator This policy has been followed in all of the Department's discipl nary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set fort at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric Dec. 1547, 1556-71 (1974),[4] which is set forth as an Appendix to thi decision.[5] The Department's sanction policy is also discussed a length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

[4] The Department's severe sanction policy did not originate with *Worsley*, but rather, was mentioned briefly in the first decision issued by the present Judicial Of ficer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed i numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 58 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[5] Severe sanctions issued pursuant to the Department's severe sanction polic were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd pe curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979) *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 318, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric.

Continued

Respondent's failure to pay for about $700,000 worth of livestock fully justifies the 2-year suspension order requested by complainant. It should be noted that there has been a drastic change in complainant's sanction policy with respect to failure to pay violations in recent years. For many years, a person who deprived a livestock seller of 1% of the value of his livestock by false weighing would be given a more severe sanction than a person who deprived the livestock seller of 100% of the value of his livestock by failing to pay for the livestock. In the latter case, a 30-day suspension order was typical. (I inherited that policy and did not change it during the period I was administrator of the Packers and Stockyards Act regulatory program.)

I suggested a drastic change in that policy in *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978). In that case, livestock sellers lost over half a million dollars because respondents took money from their livestock business, which was needed to pay sellers, and lost it gambling on the commodity futures market (37 Agric. Dec. at 550). Complainant recommended the usual 30-day "slap on the wrist" suspension order, which was imposed by the ALJ. When *respondent* appealed, I *sua sponte* raised the issue as to whether the sanction should be increased on appeal, and suggested in an order requesting additional briefs that a 5-year suspension order seemed appropriate. In imposing a 60-day suspension order in that case, it is stated (37 Agric. Dec. at 550-51):

> Just last year Congress indicated its concern that livestock producers be paid for their livestock by the enactment of amendments to the Packers and Stockyards Act which impose payment requirements even more stringent than those previously imposed by the regulations issued under the Act (Public Law 94-110, 94th Cong., 2nd Sess.; 90 Stat. 1249). In the House Report on the bill relating to these amendments, it is stated (H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p. 5; see, also, Sen. Rep. No. 94-932, 94th Cong., 2nd Sess., pp. 5-6):
>
> > USDA figures show that in 1973 some $31 billion worth of livestock and $4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm

Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

> income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

In two recent cases involving failure to pay for about $766,000.00 and $3.2 million dollars worth of livestock, respectively (*In re Robert L. Benefiel,* 32 Agr Dec 1684 (1973); *In re James L. Heller,* 34 Agr Dec 1563 (1975)), respondents were suspended for five years. Although these cases are not weighty precedents because one is a consent case and the other a default case, they show, nonetheless, that a 5-year suspension order is at least regarded as appropriate in some failure to pay cases. I believe that the respondent's failure to pay over half a million dollars in the present case warrants a similar 5-year suspension order, particularly since the respondents took the money from their successful livestock business to finance their gambling ventures.

Under a similar regulatory program administered by the Department involving perishable agricultural commodities, a violator's license is routinely revoked for failing to pay a significant amount of money for produce, even where such failure is because of legitimate business losses. See, *e.g., In re Reese Sales Company,* 28 Agr Dec 1150 (1969), affirmed *sub nom. Reese Sales Company* v. *Hardin,* 458 F.2d 183

(C.A. 9); *In re Sam Leo Catanzaro*, 35 Agr Dec 26 (1976), [*aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977)].[6] A revoked licensee may not apply for a new license for two years. 7 U.S.C. 499d(b).

[6] *Accord In re B.G. Sales Co.*, 44 Agric. Dec. ____ (Oct. 9, 1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983) (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 4 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtor's to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171, (1982) (nonpayment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent $776,459.25), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *printed in* 41 Agric. Dec. 88 (1982); *In re John Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (9th Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over $130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

> Although I believe the violations in this case warrant a 5-year suspension order to serve as an effective deterrent to future similar violations, the complainant, in the oral argument before the Judicial Officer, recommended only a 60-day suspension order. Since it is the policy of the Judicial Officer "never to increase the sanction recommended by the administrative officials" (see Appendix, p. 21a), a 60-day suspension order will be issued rather than a 5-year suspension order.

Subsequent to the decision in *Mid-States,* just quoted, the Judicial Officer overruled that portion of the Department's sanction policy which precluded him from imposing a sanction greater than that recommended by the administrative officials (*In re Rowland,* 40 Agric. Dec. 1934, 1952 (1981), *aff'd,* 713 F.2d 179 (6th Cir. 1983)). Accordingly, if *Mid-States* were to be decided today, a 5-year suspension order would be issued.

The ALJ felt that it would be desirable to permit respondent to continue in the livestock industry with the safeguards that are presently in place. I disagree! It is not desirable to permit respondent to continue in the livestock industry since that would seriously undercut the deterrent value of the administrative sanction imposed in this case. It would encourage respondent and others to act in a similar irresponsible manner in the future, greatly endangering livestock sellers.

The ALJ also indicated that under the proposed arrangement to permit respondent to remain in the livestock business during all but 30 days of the 2-year suspension period, respondent's creditors could receive a "token" repayment of the indebtedness. However, that argument has routinely been rejected in determining sanctions imposed by this Department. It has consistently been held that any hardship to the respondent's creditors, customers, commu-

" employees which might result from a suspension order is in determining the sanction since the national in-

d competitive conditions in the livestock

ils over the local interests that might be

lost as a result of a suspension order.[7]

[7] *In re Blackfoot Livestock Comm'n Co.,* 45 Agric. Dec. ___ (Mar. 7, 1986), *appeal docketed,* No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Gilardi Truck & Transp., Inc.,* 43 Agric. Dec. ___ (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.,* 42 Agric. Dec. 151, 1172 (1983); *In re Bananas, Inc.,* 42 Agric. Dec. 588, 606 (1983); *In re Melvin Greene Produce Co.,* 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd,* 728 F.2d 347 (6th Cir. 1984); *In re Powell,* 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.,* 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher,* 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z.*

Continued

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Richard N. Garver, his agents and employees, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for 2 years and thereafter until such time as he demonstrates that he is no longer insolvent. When the respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after expiration of the 2-year period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The suspension provisions shall become effective on the 30th day after service on respondent.

APPENDIX

Excerpt from *In re Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

Lancaster Stock Yards, Inc., 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH, P&S Docket No. 6174. Decided June 20, 1986.

Failure to pay—inaccurate records—Civil Penalty—Consent.

Jory Hochberg, for complainant.
Harrison W. Hertzberg, Los Angeles, CA, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO CHAIM TREIBATCH

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Chaim Treibatch admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, neither admits nor denies liability for the actions and practices of Landmark Beef Processors, Inc., waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Chaim Treibatch, hereinafter referred to as respondent Treibatch, is an individual whose mailing address is 17211 Rancho Street, Encino, California 91316.

2. Respondent Treibatch is, and at all times material herein was:

(a) Chief Financial Officer of Landmark Beef Processors and a principle owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(b) With John M. Burbank, Ronald Hillman and Alan Silverberg, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

3. Respondent Treibatch consents to the jurisdiction of the Secretary to enter this decision.

CONCLUSIONS

Respondent Chaim Treibatch having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Chaim Treibatch, his agents and employees, individually or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;

2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

Respondent Chaim Treibatch is hereby assessed a civil penalty in the amount of Twenty Thousand Dollars ($20,000.00), payable pursuant to the terms of that certain Understanding With Respect to Civil Penalty and Payment Terms, concurrently executed herewith.

The provisions of this order shall become effective on the first day after service of this decision on respondent Chaim Treibatch.

Copies hereof shall be served upon the parties.

In re: KLEMME CATTLE CO., INC., P&S Docket No. 6455. Decided February 24, 1986.

Maintain bond—Civil Penalty.

Roberta Swartzendruber, for complainant.
Kent O. Hyde, Springfield, MO, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary action brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C., section 181, et seq.), wherein the Respondent is charged with violation thereof by reason of operating as a dealer, buying and selling livestock in commerce, without having and maintaining an adequate bond, or its equivalent, as required by the Act and the regulations promulgated thereunder, by the Secretary of Agriculture (9 CFR section 201.1 et seq.).

The Complaint was filed on November 29, 1984, to which the Respondent filed an Answer on December 26, 1984.

An oral hearing was held herein on July 17, 1985, in Springfield, Missouri, before Administrative Law Judge Dorothea A. Baker. Appearing as counsel for the Complainant was Roberta Swartzendruber, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent was represented by Kent O. Hyde, Esquire, Harrison, Tucker & Geisler, 1121 S. Glenstone, Missouri 65804. Pursuant to pleadings for the reopening of the briefing period, the last brief herein was filed February 3, 1986, and the case was referred to the Administrative Law Judge on February 10, 1986.

naterially differ as to the Findings of Fact, implications flowing therefrom.

OF FACT

er referred to as Re-
s a corporation with its principal place of business located at Walnut Grove, Missouri. Its business mailing address is Route 2, Walnut Grove, Missouri 65770.

2. Respondent Klemme Cattle, at all times material herein, was engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

3. Respondent Klemme Cattle, at all times material herein, was registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce, and as a market agency buying livestock in commerce on a commission basis. (Complaint, Paragraph I(b)(2); CX 1)

4. Respondent Klemme Cattle is solely owned by Lem and Yvonne Klemme and their four children. It is directed, controlled and managed by Lem and Yvonne Klemme. (TR 57, 58, 61)

5. Respondent Klemme Cattle was sent, on September 24, 1984, and received, on September 26, 1984, formal notice from the Packers and Stockyards Administration that its bond to secure the performance of its livestock operations under the Act would expire on October 24, 1984. The notice further stated that if a new bond or its equivalent was not secured, all livestock operations for which bonding was required would have to be discontinued as of October 24, 1984, or respondent Klemme Cattle would be in violation of the Act and regulations. (CX 2, 3, 4; TR 10, 11, 14, 15)

6. Despite this notification, respondent Klemme Cattle continued in business as a dealer, engaging in livestock operations for which bonding was required under the Act without maintaining either a bond or its equivalent. (CX 6, 7, 8, 9, 10, 11; TR 11, 12, 59, 65, 70)

7. Respondent Klemme Cattle continued in violation of the Act, engaging in livestock operations for which bonding was required without having in effect a bond or its equivalent from October 24, 1984, through March 27, 1985. (CX 2, 3, 4, 5; TR 10, 11, 27, 31, 59, 65)

8. In the five month period from October 24, 1984, through March 27, 1985, during which no bond or its equivalent was in effect, Respondent Klemme Cattle purchased and sold hundreds of thousands of dollars worth of livestock in transactions for which bonding was required under the Act.

9. Except for the period alleged in the Complaint, Respondent has always maintained a Bond and abided by the Packers and Stockyards Rules and Regulations.

10. Respondent's Livestock Bond was terminated on or about October 24, 1984, because the company which provided Respondent with a Bond discontinued writing Livestock Bonds. Respondent immediately sought a new company to write a Bond, and although Respondent was diligent in its efforts to obtain a new Bond, five months expired in the interim.

11. The record is abundant with evidence that Respondent, by and through its agent, employee, and part owner, made timely attempts to obtain a new Bond.

CONCLUSIONS

The Respondent herein, during the period from October 24, 1984, through March 27, 1985, operated without a Bond or Bond equivalent in disregard of Complainant's Notice that such operations would be in violation of the Act and the regulations.

On September 24, 1984, the Complainant notified Respondent that its Bond would terminate on October 24, 1984. The Notice further instructed Respondent that if a new Bond or its equivalent was not obtained by the close of business on October 24, 1984, all livestock operations for which bonding is required under the Act had to be discontinued. Said Notice was received by the Respondent corporation.

For a period of five months from October 24, 1984, through March 27, 1985, the Respondent operated without a Bond or its equivalent. The testimony adduced at the oral hearing constitutes admissions that during the cited time period, the Respondent was in continuous violation of the Act.

During this five-month period, Respondent purchased and sold hundreds of thousands of dollars worth of livestock in unbonded transactions. In the fourth quarter of 1984 alone, Respondent, although bonded for only twenty-four days of that three-month period, purchased livestock totaling $401,968.89 while leaving a total livestock inventory for 1984 of only $22,794.44.

The requirement that a Bond or its equivalent be maintained by every dealer is a requirement imposed by the Act and the regulations (7 U.S.C. section 204; 9 CFR section 201.29, 201.30). It has been held that operation without a Bond or its equivalent is a violation of section 312(a) of the Act (7 U.S.C. section 213(a)) as an "unfair, unjustly, discriminatory, or deceptive practice or device." See *In re: Martin*, 8 A.D. 1247 (1949); *In re: White*, 23 A.D. 1104 (1964); and *In re: Centreville Livestock Auction Inc.*, 31 A.D. 765 (1972).

The Respondent does not substantially dispute the Findings of Fact in this matter, but rather maintains that before there can be finding of wilfulness in an action brought under the Packers and Stockyards Act, there must be a finding that the Respondent committed an "intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." Citing *Capital Packing Company* v. *United States*, 350 F.2d 67 (10th Circuit, 1965).

With respect to this argument of the Respondent, it will be noted initially that the Respondent did, in this case, receive a "warning letter." Moreover, the contention of the Respondent that it should not be found to have "willfully" violated the Act cannot be main-

tained in view of the precedent followed by the Department of Agriculture.

As set forth by the Complainant in its Brief, the term "willful" has many meanings, in connection with regulatory statutes such as this one. The precedent followed by the Department of Agriculture is that a prohibited action is willful if done intentionally or with careless disregard of statutory requirements. *In re: Speight*, 33 A.D. 280 (1974); *In re: Miller*, 33 A.D. 53 (1974), appeal denied, 498 F.2d 1088 (5th Circuit 1974); *In re: Rayville Livestock Inc.*, 30 A.D. 886 (1971); and *Goodman* v. *Benson*, 286 F.2d 896 (7th Circuit 1961).

Intentionally or negligently doing a prohibited act is willful under a regulatory statute such as the one here involved. This broad definition of willfulness has been adopted in precedent cases. A most recent statement of the Department's Judicial Officer is set forth in the excerpt, *infra*, from *Gerald F. Upton, d/b/a Degraff Livestock Sales, Respondent*, Docket No. P. & S. 6196, December 4, 1985:

"As stated in *In re Farrow*, 42 Agric. Dec.—(September 21, 1983) (slip op. at 54-55):

> Respondents would have to be incredibly naive not to know that their agreement violated the comprehensive Packers and Stockyards Act regulatory program. I do not believe that they are incredibly naive. But in any event, a violation is wilful, so that a suspension order can be issued (5 U.S.C. § 558(c)), if a person (i) intentionally does an act which is prohibited, irrespective of evil motive, or reliance on erroneous advice, or (ii) acts with careless disregard of statutory requirements. *In re Shatkin*, 34 Agric. Dec. 296, 298-314 (1975), and cases cited therein. And *see Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-87 (1973). (Footnote omitted)

The Court stated in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973):

> > The Secretary may suspend "for a reasonable specified period" and registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to

impose it to deter repeated violations of the Act, whether intentional or negligent."

In addition, the *Upton* case went on to state:

"Suspension orders have routinely been upheld where a finding of willfulness was made by the Department without a finding that the respondent knew that his conduct was unlawful. For example, in *Goodman* v. *Benson,* 286 F.2d 896,900 (7th Cir. 1961), the court upheld a suspension order, stating:

We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. *v.* Benson, 3 Cir., 278 F.2d 606, 609.

Similarly, in *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 609 (3d Cir. 1960), the court upheld a suspension order, stating:

Nor can we subscribe to the proposition that the test of willfulness in this context is to be evil purpose of criminal intent, for this is not a criminal statute."

The Respondent's owners and managers freely admitted during the oral hearing that the Respondent corporation had operated in violation of the Act for months after Notice, and it was further admitted that they had full knowledge and understanding of the Act's provisions and requirements, having been in the cattle business for more than 20 years. Such operation after Notice has consistently been held to be willful.

The Complainant has established on the record the reason for its requested sanction of a $1,500.00 civil penalty to be assessed against the Respondent for its willful violation of the Packers and Stockyards Act and regulations. Accordingly, such sanction is hereby imposed.

The Respondent seeks the imposition of a penalty of no more than $100.00. However, the facts and record of this case do not show valid reason for such a low penalty, and, is not consistent with the record evidence. The Complainant's sanction policy and guidelines were provided by Complainant's witness, Mr. Jack Brinckmeyer. This testimony is found at pages 84 and 85 of the transcript:

Q. Why is that you think an appropriate sanction is $1,500.00?

A. It is basically based on our present guidelines that we use in determining sanction for a failure to provide bond coverage. July, a year ago, when the bonding requirements were increased to $10,000.00 minimum, we changed our basic determination to 5 per cent of the amount of the bond that was required at the time it was terminated, plus the period of time that the person operated without bond coverage is determined in the civil penalty that is included.

Prior to that we have been using 10 per cent because of the increase in the minimum bond and requirements under 303, we tried to equate those to be in a fairly equal position.

* * * * * * *

Q. Do you feel, Mr. Brinckmeyer, in your opinion as an employee of the Packers and Stockyards Administration, do you feel that the penalty of $1,500.00 is what is necessary to basically assure the Department that Mr. Klemme won't again operate without a bond?

A. That's part of it. We feel that the penalty is also to indicate to other people that would be inclined to violate the Act, that they should stay in compliance. I will have to say that we have started and are continuing to increase our sanctions, not only on civil penalties but on suspensions as well, to a point to where we have more voluntary compliance, if you want to call it that. I feel this penalty is in an area that we need at the present time to insure compliance by respondent, as well as other people who would be inclined in engage in the same type of violations.

The Department's deciding official, the Judicial Officer, has stated many times what is set forth in the 1974 decision of: *In re: Worsley*, 33 A.D. 1547, that it is the policy of the Department to impose severe sanctions upon Respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department.

The record evidence herein firmly establishes the seriousness of Respondent's violations. For months, Respondent Klemme Cattle engaged in livestock transactions totalling hundreds of thousands of dollars while offering the industry no surety protection in event of its failure to pay those with whom it engaged in business.

Accordingly, the following Order is appropriate, and, it is so issued.

ORDER

Respondent Klemme Cattle Company, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a dealer or market agency subject to the Act, shall cease and desist from engaging in business subject to the Act without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. section 213(b)), Respondent is assessed a civil penalty of One Thousand Five Hundred Dollars ($1,500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Roberta Swartzendruber, Esquire, Office of the General Counsel, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

The provisions of this Order shall become effective Thirty-five days after service thereof unless appealed by a party hereto within Thirty Days after service, all as more fully set forth in the Rules of Practice and Procedure, 7 CFR 1.131, *et seq,* 1.145(a) and 1.142(c).

Copies of this Decision shall be served upon the parties.

[Decision and Order became final on June 21, 1986.—Ed.]

In re: B. C. UMBERGER, P&S Docket No. 6691. Decided June 23, 1986.

Cease and desist failure to pay for purchases—Suspension—Consent.

Andrew Stanton, for complainant.
James A. Boyd, Wytheville, VA, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. B. C. Umberger, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 265, Wytheville, Virginia 24382.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent B. C. Umberger, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of four weeks.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: FRED COCHRAN and DALE COCHRAN, P&S Docket No. 6693. Decided June 23, 1986.

Insufficient funds—failure to pay—Suspension—Consent.

Roberta Swartzendruber, for complainant.
Edward F. Rate, Iowa City, IA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Fred Cochran and Dale Cochran, hereinafter referred to as the respondents, are individuals whose principal places of business are located in North Liberty, Iowa, and Coralville, Iowa, and whose business mailing address is R.R. 2, North Liberty, Iowa 52317.

2. Respondents, at all times material herein, were:

(a) Engaged in the business of buying livestock in commerce for their own accounts; and

(b) Registered with the Secretary of Agriculture as dealers to buy and sell livestock in commerce for their own accounts.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Fred Cochran and Dale Cochran, their agents and employees, directly or through any corporate or other device, in

connection with their business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondents Fred Cochran and Dale Cochran are suspended as registrants under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of six months for respondent Fred Cochran and after two years for respondent Dale Cochran upon demonstration by respondents that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondents' salaried employment by another registrant after the expiration of a six month suspension for Fred Cochran and a two year suspension for Dale Cochran.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: RAYMOND HENSLEY, P&S Docket No. 6534. Decided June 26, 1986.

Bonding required—Civil Penalty—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Raymond Hensley, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 199, Collins, Missouri 64738.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account, and a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Raymond Hensley, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The respondent is assessed a civil penalty, the dollar amount of which shall be five percent (5%) of the respondent's required amount of bond coverage, not to exceed Two Thousand Seven Hundred and Fifty Dollars ($2,750.00). The amount of required bond coverage is dependent on the amount of livestock purchased during the respondent's business year as set forth in Packers and Stock-

yards Administration regulations at 9 CFR § 201.30. The respondent agrees to furnish the dollar amount of all his livestock purchases from January 1, 1985, through March 31, 1986, to the Packers and Stockyards Administration's Kansas City, Missouri, Regional Office at 828 Livestock Exchange Building, Kansas City, Missouri 64102.

When the livestock purchase figures are received and the amount of the respondent's required bond is determined, the dollar amount of the civil penalty shall be assessed as set forth herein and the respondent shall be immediately notified by the Regional Office of the required dollar amount for his bond and the amount of his assessed penalty.

Should this dollar amount of livestock purchases *NOT* be received by the Regional Office within the 30 day period following the date this decision is signed by the administrative law judge, the maximum civil penalty of Two Thousand Seven Hundred and Fifty Dollars ($2,750.00) is hereby assessed against the respondent.

Upon the effective date of this order, respondent Raymond Hensley shall make a payment of Two Hundred and Fifty Dollars ($250.00) toward the total civil penalty to be assessed, such payment to be made by certified check payable to the Treasurer of the United States clearly marked with the case docket number and sent to Roberta Swartzendruber, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2446, South Building, Washington, D.C. 20250-1400. Payments in the sum of Two Hundred Fifty Dollars ($250.00) per month shall be made in like manner by respondent on the remaining balance of the civil penalty until paid in full. These payments are to commence on the first day of the month following respondent Hensley's notification of the amount of civil penalty assessed.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: GILES AND STRATTON AUCTION, INC., a corporation, d/b/a LIVESTOCK PRODUCERS, FLOYD GILES, an individual, and RONNIE STRATTON , an individual, P&S Docket No. 6660. Decided June 26, 1986.

Insolvent—Civil Penalty—Suspended—Consent.

Roberta Swartzendruber, for complainant.
Michael Epley, Magnolia, AR, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Giles and Stratton Auction, Inc., doing business as Livestock Producers, hereinafter referred to as the corporate respondent, is a Louisiana corporation whose mailing address is R.R. 1, Box 666, Bossier City, Louisiana 71112.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating Livestock Producers stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis and as a dealer buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and as a dealer to buy and sell livestock in commerce for its own account.

3. Floyd Giles and Ronnie Stratton, hereinafter referred to as individual respondents Giles and Stratton, are sole owners of the corporate respondent. Individual respondent Giles is president and individual respondent Stratton is vice president of the corporate respondent.

4. Individual respondents Giles and Stratton direct, manage and control the business activities of corporate respondent.

5. The individual respondents Giles and Stratton are market agencies and dealers within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Giles and Stratton Auction, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Floyd Giles and Ronnie Stratton, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42 of the regulations, amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Failing to otherwise maintain and use properly their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

5. Consigning livestock to any stockyard for sale under false or fictitious names;

6. Preparing buyer's bills which fail to disclose the full, true and correct names of the buyers of consigned livestock;

7. Permitting its auctioneer or other key employees to purchase livestock from consignments for speculative resale or to fill orders; and

8. Selling consigned livestock to any owner, officer, agent, employee, or any such person having an ownership or financial interest in the market without disclosing the name of the buyer and the nature of the relationship existing between the market agency and the buyer on the account of sale issued to the consignor. Further, such disclosure shall be publicly announced at the time of sale.

Respondents Giles and Stratton Auction, Inc., and Floyd Giles are suspended as registrants under the Act for a period of seven (7) days and thereafter until they demonstrate that they are no longer insovlent and that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that they are no longer insolvent and that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the seven (7) day period.

Respondent Stratton is prohibited for a period of seven (7) days from engaging in business or operating subject to the Act as a dealer and/or market agency.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are hereby assessed a civil penalty in the amount of seventeen thousand dollars ($17,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: TERRY KREWSON, BOBBIE KREWSON, D. E. KREWSON, and LICKING LIVESTOCK AUCTION COMPANY, INC., P&S Docket No. 6702. Decided June 26, 1986.

Failure to maintain accounts—failure to pay promptly—failure to pay full purchase price—suspended—must eliminate deficits—meet bonding requirements—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

ling was instituted under the Packers and Stockyards
§ 181 *et seq.*) by a complaint filed by the Administra-

tor, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in Part I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Terry Krewson and Bobbie Krewson were, at all times material herein, partners doing business as Licking Livestock Auction Co., and having their principal place of business at Licking, Missouri. Respondents' business address is P. O. Box 299, Licking, Missouri 65542.

2. Respondents Terry Krewson and Bobbie Krewson were, at all times material herein:

(a) Engaged in the business of conducting and operating the Licking Livestock Auction Co. stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

3. In addition to his partnership activities set forth above, respondent Terry Krewson, was, at all times material herein:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

4. On April 5, 1985, Licking Livestock Auction Co. was incorporated under the laws of the State of Missouri as Licking Livestock Auction Company, Inc.;

5. Licking Livestock Auction Company, Inc., hereinafter referred to as corporate respondent, succeeded respondents Terry and Bobbie Krewson doing business as Licking Livestock Auction Co. in the conduct and operation of Licking Livestock Auction Company stockyard and is engaged in business as a market agency selling

livestock on a commission basis, but is not so registered with the Secretary.

6. Respondent Terry Krewson is responsible for the day-to-day management of the corporate respondent.

7. D. E. Krewson, father of respondent Terry Krewson, at all times material herein was:

(a) Owner, in combination with his wife, of all corporate respondent's stock;

(b) President of the corporate respondent; and

(c) Responsible, in combination with respondent Terry Krewson, for the direction, management and control of all business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Licking Livestock Auction Company, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Terry Krewson, Bobbie Krewson, and D.E. Krewson, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regulations, amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable from the sale of consigned livestock;

3. Failing to otherwise maintain and use properly their Custodial account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

5. Consigning livestock to any stockyard for sale under false or fictitious names;

6. Selling consigned livestock under false or fictitious names;

7. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account(s) upon which such checks are drawn to pay such checks when presented;

8. Failing to pay, when due, the full purchase price of livestock;

9. Failing to pay the full purchase price of livestock; and

10. Engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents Terry and Bobbie Krewson are suspended as registrants under the Act for a period of twenty one (21) days and thereafter until they demonstrate that they are no longer insolvent and that the deficit in their custodial account has been eliminated. When respondents demonstrate that they are no longer insolvent and that the shortage in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty one (21) day period.

Licking Livestock Auction Company, Inc., and respondent D. E. Krewson are prohibited for a period of twenty one (21) days from engaging in business or operating subject to the Act as a dealer and/or market agency selling livestock on a commission basis and thereafter until they demonstrate that Licking Livestock Auction Company, Inc., is no longer insolvent, that the deficit in its custodial account has been eliminated, and that it is in compliance with the bonding requirements under the Act and the regulations. When respondents demonstrate that Licking Livestock Auction Company, Inc., is no longer insolvent, that the shortage in its custodial account has been eliminated, and that it is in full compliance with the bonding requirements under the Act and the regulations, a supplemental order will be issued in this proceeding terminating this prohibition after the expiration of the twenty one (21) day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK and GEORGE BITZ, P&S Docket No. 6678. Decided June 30, 1986.

Custodial account misuse—misuse of funds—Suspended—Consent.

Jory Hochburg, for complainant.
Joseph A. Vogel, Jr., Mandan, ND, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO DONALD A. HAUCK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Donald Hauck admits the jurisdictional allegations in paragraph I of the Complaint as those allegations pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Donald A. Hauck, hereinafter referred to as respondent Hauck, is an individual whose business address is P. O. Box 1914, Minot, North Dakota.

2. Respondent Hauck, at all times material herein was:

(a) President of respondent Napoleon;

(b) Owner of 51 per cent of the outstanding stock issued by respondent Napoleon;

(c) Responsible for the direction, management and control of respondent Napoleon;

(d) Engaged in the business of conducting and operating the Napoleon Livestock Auction, Inc. stockyard, a posted stockyard subject to the Act;

(e) Engaged in the business of selling livestock on a commission basis at the Napoleon stockyard, buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(f) A dealer and a market agency, within the meaning and subject to the provisions of the Act.

3. Since September 6, 1985, respondent Hauck has been registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce at the Northern Livestock Exchange, a posted stockyard subject to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Hauck, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of his own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or for the payment of amounts due the respondents for lawful marketing charges;

4. Reducing or eliminating the selling commission required by the stockyard's approved tariff for consignments of livestock to the stockyard;

5. Providing free or reduced transportation to consignors for livestock consigned to the stockyard for sale; and

6. Paying all or a portion of the lodging costs or other expenses incurred by buyers attending sales held by the stockyard.

Respondent Hauck is suspended from operating as a dealer or a market agency subject to the Act and is prohibited from acting as the agent or employee of a dealer or a market agency subject to the Act for a period of 21 days.

The provisions of this Order shall become effective upon filing.

Copies of this decision shall be served upon the parties.

In re: NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK and GEORGE BITZ, P&S Docket No. 6678. Decided June 30, 1986.

Custodial accounts—deposit proceeds—misuse of funds—suspension—prohibition as dealer—Consent.

Jory Hochberg, for complainant.
Joseph A. Vogel, Jr., Mandan, ND, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RESPONDENTS NAPOLEON LIVESTOCK AUCTION, INC., AND GEORGE BITZ

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Napoleon Livestock Auction, Inc., and George Bitz admit the jurisdictional allegations in paragraph I of the complaint as those allegations pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Napoleon Livestock Auction, Inc., hereinafter referred to as respondent Napoleon, is a corporation organized and existing under the laws of the State of North Dakota. Its business mailing address is P. O. Box 3, Napoleon, North Dakota 58561.

2. Respondent Napoleon is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Napoleon Livestock Auction, Inc. stockyard, a posted stockyard subject to the Act, hereinafter referred to as the stockyard; and

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, buying livestock on a commission basis in commerce, and buying and selling livestock in commerce for its own account.

3. Respondent Napoleon is, and at all times material herein was, registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

4. George Bitz, hereinafter referred to as respondent Bitz, is an individual whose business mailing address is P. O. Box 3, Napoleon, North Dakota 58561.

5. Respondent Bitz is, and at all times material herein was:

(a) A corporate officer of respondent Napoleon;

(b) Owner of at least 49 percent of the outstanding stock issued by respondent Napoleon;

(c) Responsible for the direction, management and control of respondent Napoleon;

(d) Engaged in the business of conducting and operating the stockyard;

(e) Engaged in the business of selling livestock on a commission basis at the stockyard, buying livestock on a commission basis in commerce, and buying and selling livestock in a commerce for his own account; and

(f) A dealer and a market agency, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondents Napoleon and Bitz having admitted the jurisdictional facts as they pertain to them and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Napoleon, its officers, directors, employees, agents, successors and assigns, and respondent Bitz, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)) amounts due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or for the payment of amounts due the respondents for lawful marketing charges;

4. Reducing or eliminating the selling commission required by the stockyard's approved tariff for consignments of livestock to the stockyard;

5. Providing free or reduced cost transportation to consignors of livestock to the stockyard for sale; and

6. Paying all or a portion of the lodging costs or other expenses incurred by buyers attending sales held by the stockyard.

Respondent Napoleon is suspended as a registrant subject to the Act and respondent Bitz is prohibited from operating as a dealer or market agency subject tothe Act or acting as an employee or agent of a dealer or a market agency subject to the Act for a period of 21 days and thereafter until such time as they demonstrate that the deficit in their custodial account has been eliminated. When respondents demonstrate that the deficit in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 21-day period.

The provisions of this order shall become effective upon filing of this decision.

Copies of this decision shall be served upon the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: FARMERS LIVESTOCK AUCTION, INC., P&S Docket No. 6266. Decided May 14, 1986.

Suspension modified to terminate—deficit in accounts eliminated.

Mary Hochberg, for complainant.
Gerald Eftink, Kansas City, MO, for respondent.

Decision for John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On November 14, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of 28 days and thereafter until the deficit in respondent's custodial account was eliminated. The effective date of this suspension was later modified by orders issued on December 11, 1985, and April 15, 1986.

Respondent has now demonstrated that the deficit in its custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 15, 1986, is modified to terminate after the expi-

ration of the 28 day period of suspension. The order shall remain in full force and effect in all other respects.

In re: BUSHELLE CATTLE COMPANY, INC., P&S Docket No. 6639. Decided May 14, 1986.

Late Appeal denied.

Roberta Swartzendruber, for complainant.
John P. Smith, Park Rapids, MN, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING LATE APPEAL

Respondent's appeal was filed with the Hearing Clerk on April 28, 1986, after it had become final and effective on April 26, 1986. Accordingly, respondent's appeal must be dismissed because it was not timely filed. See *In re Powell,* 44 Agric. Dec. ____ (May 28, 1985), attached as Appendix A.

Even if respondent's appeal had been timely filed, it would have been dismissed because respondent failed to file a timely answer. See *In re Daul,* 45 Agric. Dec. ____ (Mar. 6, 1986), attached as Appendix B.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's appeal is denied since it was filed after the Administrative Law Judge's decision had become final.

APPENDIX A

In re Powell, 44 Agric. Dec. ____ (May 28, 1985)

APPENDIX B

In re Daul, 45 Agric. Dec. ____ (Mar. 6, 1986)
[Both excerpts omitted.—Ed.]

In re: GARY WESSELS, P&S Docket No. 6423. Decided June 13, 1986.

Suspension terminated—compliance.

Roberta Swartzendruber, for complainant.
Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 29, 1984, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act for a period of 180 days and thereafter until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 29, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In re: RANCHERS AND FARMERS LIVESTOCK AUCTION, INC., and L. KIRBY POWELL, P&S Docket No. 6692. Decided June 23, 1986.

Suspension terminated.

Jory Hochberg, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On May 5, 1986, an order was issued in the above-captioned matter which, *inter alia,* suspended the corporate respondent as a registrant under the Act for a period of 21 days and thereafter until its current liabilities do not exceed its current assets.

Corporate respondent has now demonstrated that its current liabilities do not exceed its current assets. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 5, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: ALLEN H. RIFFEE, P&S Docket No. 6477. Decided June 30, 1986.

Suspension period expired—bonding requirements met.

Stephen Luparello, for complainant.
Arthur Lambiotte, Woodstock, VA, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On December 13, 1985, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act for a period of four months and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations.

The four month period of suspension has expired and respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 13, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: CARTER-KIRCHOFF FEED YARD, INC., and BOB CARTER, P&S Docket No. 6611. Decided June 30, 1986.

Full restitution date established.

Dennis Becker, for complainant.
R. Byron Bass, Jr., Lubbock, TX, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

AMENDMENT OF ORDER

For good cause show, and on agreement of counsel for both parties, that portion of the Order of April 2, 1986, which provides that:

> In accordance with section 312(b) of the Act, the corporate respondent and individual respondent are assessed jointly and severally a civil penalty of one hundred thousand dollars ($100,000.00), with the proviso that the civil penalties will be waived if full restitution is made to the parties named in paragraph II(a) of the complaint within 90 days of the entry of this order.

is amended to provide that full restitution must be made by August 18, 1986.

REPARATION DECISIONS

STANLEY V. GLOVER, *v.* LIMON LIVESTOCK EXCHANGE and MIKE JORGENSEN, P&S Docket No. 6562. Decided June 10, 1986.

Full payment—Complaint dismissed.

Peter V. Train, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

ORDER OF DISMISSAL

Complainant having informed the presiding officer that he has received full payment of his claim, the above-captioned complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

In re: LEO ZEMLISKA, d/b/a PROFESSIONAL FEEDER CONSULTANTS, *v.* GLASGOW LIVESTOCK SALES CO., and ROBERT D. FJELDHEIM, P&S Docket No. 6064. Decided June 20, 1986.

Failure to pay—agency—indemnity for expenses and losses—instructions violated—portion dismissed—reparations.

Thomas Heinz, Presiding Officer.
John L. Davidson, Billings, MT, for complainant.
Robert M. Cook, Norfolk NE, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*), hereinafter "the Act," begun by a complaint timely filed on February 11, 1982, alleging in substance that respondents failed to reimburse complainant for livestock purchased on order by complainant for respondents. The amount claimed as reparation was $57,016.32. That amount was changed on brief to $41,501.25 plus interest thereon at the rate of 16.5% per annum from November 15, 1983, until paid. A copy of the formal complaint and the investigation report prepared by the Packers and Stockyards Administration of this Department was served on respondents.

Respondents filed a timely answer generally denying the allegations of the complaint. Further, in allegations later abandoned on brief, respondents alleged that the Secretary of Agriculture lacks

jurisdiction over the parties and the subject matter, that the complaint was untimely filed and that complainant has been paid. Respondents requested an oral hearing. Accordingly, oral hearings were held on November 22 and 23, 1983, in Billings, Montana, before Joanne I. Schwartz of the Office of General Counsel of this Department. Complainant was represented by John R. Davidson, Esquire, of Davidson, Veeder, Baugh, Broeder, Poppler & Michelotti, Billings, Montana. Respondents were represented by Robert M. Cook, Esquire, Norfolk, Nebraska. Complainant testified on his own behalf and introduced six exhibits. Three witnesses testified for respondents who introduced two exhibits. After the oral hearing was held, complainant requested leave to introduce rebuttal evidence by deposing two individuals who did not appear at the hearing. Although orders were issued to depose both of these two individuals using written interrogatories and cross-interrogatories, complainant encountered difficulties in his attempts to depose one of them, and eventually agreed to proceed without that individual's deposition. Briefing by the parties was completed on November 18, 1985.

FINDINGS OF FACT

1. Complainant Leo Zemliska (hereinafter "Zemliska") is an individual doing business as "Professional Feeder Consultants," with his principal place of business located at Newcastle, Wyoming. At all times material herein, Zemliska was registered with the Secretary as a dealer to buy and sell livestock for his own account and as a market agency to buy livestock on commission for the account of others. Zemliska has been engaged in the livestock business for many years.

2. Respondent Glasgow Livestock Sales Company, at all times material herein, was a corporation registered with the Secretary as a dealer to buy and sell livestock for its own account and as a market agency to sell livestock on a commission basis for the account of others. The corporate respondent had its principal place of business located in Glasgow, Montana. Fjeldheim Livestock, Incorporated, is the successor corporation to Glasgow Livestock Sales Company.

3. Respondent Robert D. Fjeldheim is an individual who at all times material herein was the president and sole stockholder of the corporate respondent. The respondents hereinafter will be referred to collectively as "Fjeldheim." Fjeldheim has been engaged in the livestock business for many years.

4. During August of 1981, Fjeldheim received an order from one Marlyn Dahlquist (hereinafter "Dahlquist") of Laurel, Nebraska, to

purchase approximately 1,000 heifers and heiferettes suitable for his feeding operations. Dahlquist operated feed lots in Laurel, Nebraska, and Avon, South Dakota, and wanted animals which were relatively young, with healthy mouths, not pregnant and, if properly fed, capable of gaining weight to the point where their meat would grade higher upon slaughter than it would have if the animals were slaughtered immediately after purchase. The livestock were to be furnished to Dahlquist subject to his approval. The agreement required Fjeldheim to use his own funds to purchase the livestock and to bill Dahlquist for the actual cost of the cattle plus a buying commission of $1.00 per hundredweight for his services.

5. In early December, 1981, as part of his continuing efforts to fill the order from Dahlquist, Fjeldheim requested Zemliska purchase some of the same type of animals at livestock auction markets in Sturgis and Belle Fourche, South Dakota. Fjeldheim told Zemliska that the cattle were to be purchased for a third party who had the right to reject them upon receipt, but Fjeldheim did not reveal Dahlquist's identity at this time. Like the Dahlquist-Fjeldheim agreement, the agreement between Fjeldheim and Zemliska required Zemliska to use his own funds to purchase the livestock and to bill Fjeldheim for the actual cost of the cattle plus a buying commission of $.50 per hundredweight to compensate Zemliska for his buying services. Zemliska was also responsible for arranging truck transportation of the animals to a destination which was to be communicated to the trucker after departure from the purchase location.

6. Pursuant to his order, in early December, 1981, Zemliska purchased two loads of cattle at Sturgis and Belle Fourche, South Dakota, arranged their transportation, and issued accountings to Fjeldheim, who accordingly reimbursed Zemliska, paid the agreed $.50 per hundredweight buying commission, and billed Dahlquist for the cost of the cattle plus a commission of $1.00 per hundredweight. There is no controversy between the parties regarding these two loads of cattle which were accepted by Dahlquist upon receipt.

7. Based on Dahlquist's acceptance of the cattle purchased by Zemliska at Sturgis and Belle Fourche, South Dakota, Fjeldheim instructed Zemliska to purchase additional livestock of the same type and quality at Torrington, Wyoming and St. Onge, South Dakota. Thereafter, on December 4, 1981, using his own funds, Zemliska purchased 345 head of livestock at Torrington Livestock Commission Company, Torrington, Wyoming. Zemliska billed Fjeldheim for $125,835.94 which included the buying commission of $1,481.55 of these 345 head. Fjeldheim accordingly issued a check to

Zemliska to reimburse him for the cost of the cattle and to pay the buying commission. Pursuant to instructions from Fjeldheim, these cattle were shipped to Dahlquist's feedlots in Avon, South Dakota, where they arrived on December 5, 1981.

8. On December 5, 1981, using his own funds, Zemliska purchased 112 head of livestock at Madden's Livestock Market, Inc., St. Onge, South Dakota, for $41,072.03 and billed Fjeldheim for $41,574.38 which included a buying commission of $502.35. Fjeldheim thereafter issued a check to Zemliska to reimburse him for the cost of the cattle and to pay the buying commission. These cattle were shipped, pursuant to instructions from Fjeldheim, to Dahlquist in Avon, South Dakota, on December 6, 1981, and arrived on December 7, 1981.

9. On or about December 7, 1981, Russell Hamilton, manager of Dahlquist's feedlots in Avon, South Dakota, telephoned Dahlquist in Laurel, Nebraska, to tell him the livestock received from Torrington, Wyoming, and St. Onge, South Dakota on December 5 and 7 were not heiferettes, did not conform, were not suitable for feeding and were not of the same type and quality as the livestock previously received from Sturgis and Belle Fourche.

10. Dahlquist personally inspected the cattle on December 9, 1981, and concluded only 91 out of the 457 head shipped from Torrington and St. Onge conformed to his order. On the same day, he telephoned Fjeldheim to reject the non-conforming cattle.

11. On December 9, 1981, pursuant to his order from Fjeldheim and using his own funds, Zemliska purchased 36 head of livestock at Torrington Livestock Commission Company, Torrington, Wyoming, for $13,711.47.

12. During the morning of December 10, 1981, before the cattle purchased the proceeding day could be shipped, Fjeldheim telephoned Zemliska to inform him that on December 9, 1981, Dahlquist had rejected the cattle which had arrived at his feedlots on December 5 and December 7 because there were "too many lumps and bumps and [the livestock] did not conform to the order." Transcript, p. 159. Fjeldheim instructed Zemliska to resell in Torrington the 36 head purchased on December 9 and promised to indemnify him for any loss upon resale. When resold, these 36 cattle incurred a loss of $2,813.48.

13. On December 10, 1981, Zemliska purchased 113 head of livestock from Fjeldheim for $26,658.30, which amount has not been paid.

14. On December 10, 1981, Fjeldheim agreed to pay one half the air fare for Zemliska to fly to Avon, South Dakota in order that he,

Zemliska, could inspect the cattle which Dahlquist had rejected. The total air fare for the trip was $425.00.

15. Zemliska inspected the cattle on December 11, 1981. Thereafter, on several occasions between December 11 and December 30, 1981, Zemliska, Fjeldheim, Dahlquist and his agents, and South Dakota brand inspectors examined the cattle which had been rejected by Dahlquist. These examinations were prompted by Zemliska's contention that the cattle Dahlquist had rejected were not all the same cattle he had purchased at Torrington, Wyoming, and St. Onge, South Dakota, on December 4 and 5 respectively.

16. On or about December 11 or 12, 1981, Zemliska entered into an agreement with Russell Hamilton, subsequently ratified by Dahlquist, wherein Dahlquist agreed to feed the rejected livestock for Zemliska until Zemliska could ascertain whether the livestock were in fact those which he had purchased at Torrington and St. Onge.

17. On December 14, 1981, Fjeldheim stopped payment on the checks which had been issued to pay for the cattle purchased by Zemliska pursuant to order on December 4 and 5, 1981.

18. On December 30, 1981, Zemliska arranged for the resale of 363 head of the 457 head of disputed livestock at auction markets in Yankton and Mitchell, South Dakota. Zemliska received proceeds from those resales totalling $113,070.99.

19. Out of the disputed 457 head, three died before they could be resold, one in transit to Dahlquist's feedlots and the other two while in the feedlots. Zemliska has received insurance compensation of $296.12 for the animal that died in transit.

20. The remaining 91 head out of the disputed 457 head were resold to one Gary Erwin and generated net proceeds of $38,663.82, which amount Fjeldheim has retained and not remitted to Zemliska.

SUBSIDIARY FINDINGS AND CONCLUSIONS

Zemliska contends, in effect, that he properly purchased 457 head of livestock pursuant to an order received from Fjeldheim, and that by the time they were inspected by Fjeldheim's prospective purchaser, Dahlquist, some unknown party or parties had mixed in or substituted different cattle for some of those he had purchased. Further, Zemliska contends that even if the livestock did not conform to the order, Dahlquist and hence Fjeldheim did not reject them in a timely manner. Zemliska argues that he purchased the livestock as an agent for Fjeldheim who, as the owner of the livestock, must bear the loss incurred when Dahlquist improperly rejected the cattle and they had to be resold. Fjeldheim, on the

other hand, claims that Zemliska was not an agent, rather he was the seller to Fjeldheim who as the buyer rightfully rejected the livestock which did not conform to the contract of sale. Therefore, Fjeldheim argues, Zemliska as seller must suffer the losses incurred in the salvage sale of the nonconforming cattle. Neither party's argument can be entirely endorsed. Although Zemliska correctly argues that he acted as Fjeldheim's agent, that fact does not permit him to recover all the expenses and losses claimed in this case. On the contrary, by unjustifiably tendering livestock which concededly did not conform to the order, Zemliska failed to fulfill his duty as an agent to follow instructions and cannot be indemnified for the losses and expenses occasioned by the transactions.

Nature of Relationship Between the Parties

Section 1 of the Second Restatement of Agency provides as follows:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> (2) The one for whom action is to be taken is the principal.
>
> (3) The one who is to act is the agent.

The agreement between Zemliska and Fjeldheim clearly manifests a contract of agency. Fjeldheim gave instructions as to the type of cattle to buy, where to buy them, at what price and weight, and where to send them after purchase. Zemliska acted subject to Fjeldheim's control and primarily for Fjeldheim's benefit, not his own, which distinguishes their relationship from that of a buyer and seller.

> One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.

Section 14K, Restatement of Agency, 2d.

Zemliska was to be paid a flat commission of $.50 per hundredweight for his buying services. He was required to bill Fjeldheim for the exact costs of the cattle. This is a crucial fact in the determination of the nature of the relationship between the parties. If Zemliska had been a seller here, that is, a dealer rather than an agent, he would have been free to make a speculative profit in the venture. He was not. His only personal benefit was the flat per

hundredweight commission. Moreover, if the parties had been operating as buyer and seller rather than as principal and agent, it is very unlikely Fjeldheim would have felt obligated to promise indemnification, as he did, for any loss suffered on the 36 head of cattle Zemliska bought on December 9, 1981 at Torrington, Wyoming.

A considerable portion of the record in this case concerns brand certificates issued and reissued at various points by various persons. Under the best of circumstances, the brand certificates are merely *prima facie*, not conclusive, evidence of ownership. (Section 11-20-108 of Wyoming statutes of 1977.) The evidence in this case shows that at the time the cattle were purchased, Zemliska knew he was not purchasing them for his own account but rather for a third party whose identity was known to Fjeldheim but not to Zemliska at that time. Dahlquist's identity was revealed to Zemliska later. Under these circumstances, it was understandable and reasonable for Zemliska to identify Fjeldheim as the "owner." Since there is no evidence the brand inspectors who filled out the original brand certificates had any source of information about the relationship between the parties independent of Zemliska, those brand certificates cannot be taken conclusively to determine the true ownership of the cattle. They merely reflect what Zemliska told the brand inspectors. The reissued brand certificates in the record are likewise unreliable indicators of ownership because the person who filled them out was not shown to be aware of the true nature of the relationship between the parties.

Invoices, health certificates and bills of lading in the record variously designate both Zemliska and Fjeldheim as the person who was "owner," "shipper," "consignor," "consigned to," "consignee," and "purchaser." Like the brand certificates, these documents do not reveal or determine the true nature of the relationship between the parties.

The ultimate purchaser of the disputed livestock was to be Dahlquist. The agreement between Dahlquist and Fjeldheim was identical to the Fjeldheim-Zemliska agreement except that Dahlquist agreed to pay a buying commission of $1.00 per hundredweight over the exact cost of the cattle rather than the $.50 per hundredweight Fjeldheim agreed to pay Zemliska for Zemliska's services. Fjeldheim's sole personal benefit from the transactions derived from the flat-rate buying commission. Like Zemliska, he was not free to make a speculative profit from the deal. In other words, like Zemliska, Fjeldheim also was acting as an agent. Zemliska was the subagent for Fjeldheim, the agent for Dahlquist, the principal.

Duties and Liabilities of the Parties

The Second Restatement of Agency and Corpus Juris Secundum set out the following rules defining the duties and liabilities of the parties in this case:

> (1) Unless otherwise agreed a subagent who knows of the existence of the ultimate principal owes him the duties owed by an agent to a principal, except the duties dependent upon the existence of a contract.
>
> (2) Unless otherwise agreed, a subagent owes the agent the duties of an agent to his principal.

Restatement of Agency, 2d, § 428.

Comment(c) to section 428 describes the situation where Zemliska knew that he was purchasing cattle for an unknown third party.

> (c) Principal partially disclosed. A subagent who knows of the existence but does not know of the identity of the principal has in general the same liabilities as one who knows of the identity of the principal.

Zemliska was obliged to obey instructions from Fjeldheim.

> It is an agent's duty to adhere faithfully to all instructions given him by his principal, and his violation of the instructions will serve to make the agent liable for any loss or damage which may result therefrom.

3 C.J.S. Agency § 288

If Zemliska followed instructions, Fjeldheim is required to indemnify him for expenses and losses.

> The general rule is that where one is employed or directed by another to do an act in his behalf, not manifestly wrong, the law implies a promise of indemnity by the principal for damages resulting from or expenditures incurred as a proximate consequence of the good faith execution of the agency . . .

3 C.J.S. Agency § 321.

However, if Zemliska did not obey instructions and committed unauthorized acts, Fjeldheim is not required to indemnify the losses and expenses caused by the unauthorized acts.

> Unless otherwise agreed, the principal is not subject to a duty to indemnify an agent:

(a) for pecuniary loss or other harm, not of benefit to the principal, arising from the performance of unauthorized acts or resulting solely from the agent's negligence or other fault . . .

Restatement of Agency, 2d, § 440

The Dahlquist-Fjeldheim cattle order called for heifers and heiferettes in healthy condition and suitable for feeding purposes. Invoices in the record show a majority of the cattle Zemliska purchased were cows, not heifers or heiferettes.[1] Gail Sohler, the owner and operator of the auction market where many of the rejected cattle were resold testified that the rejected cattle were "all butcher cows." (TR 360) Mike Madden, owner and operator of the auction market in St. Onge where Zemliska purchased 112 of the disputed livestock, testified that Zemliska bought 82 aged cows and 30 heiferettes. (TR 226, 228) In his deposition, Dallas Larson said he was present at the December 4, 1981, sale at Torrington when Zemliska was buying and saw the purchase of animals which would not qualify as heiferettes. Moreover, invoices made out at the time Zemliska purchased the animals in dispute show several which were "lame," "rough," or suffering from a cancerous eye, conditions which adversely affected their suitability for feeding purposes. It is therefore clear that many of the 457 head of cattle which are subject of this dispute did not conform to that order in that they were not heifers, were too old to be heiferettes or were not suitable for feeding purposes; they were cows suitable only for butcher purposes.

In fact, Zemliska does not dispute that a significant number of the livestock did not conform to the order, but he claims he did not buy them. Rather, he argues there had to have been a mix-up at some point along the line from his purchase to rejection by Dahlquist. In other words, Zemliska contends that he followed his principal's instructions, but that someone else was responsible for the delivery of non-conforming livestock. This argument is unpersuasive. There is *prima facie* proof Zemliska violated instructions, but he has failed to carry his burden to prove he was not responsible for the delivery of cattle which did not conform to the order.

[1] Although there is some considerable debate in the record concerning the exact meaning of "heiferette," there can be no doubt that the term does not include butcher cows. (*See, Grischott* v. *Willard*, 28 Agric. Dec. 423 (1969) where it was found that the disputed animals were cows and too old to be "heiferettes," making them unfit as feeders.)

> The principal has the burden of proving that the agent has been guilty of negligence or misconduct or has violated instructions; these matters will not be presumed, but where there is prima facie proof thereof, the agent has the burden of showing facts relieving him from liability or reducing the amount of damages.

3 C.J.S. § 507; *See also, Robbins* v. *Roumel*, 138 A.2d 922 (D.C. 1958).

Zemliska submitted into evidence lists of back tag numbers reportedly attached to the cattle at the time they were purchased, along with lists of back tag numbers purportedly found on some of the cattle purchased at St. Onge when inspected at Dahlquist's feedlots. These lists show gaps in the numbers, unassigned numbers, missing tag numbers, and unexplained and undecipherable notations. Therefore, these lists do not support Zemliska's argument that the back tag numbers do not match, thereby proving a mix-up of the cattle.

Terry Gropper was the South Dakota brand inspector who prepared the brand inspection certificate for the 112 head of cattle Zemliska purchased at St. Onge, South Dakota, on December 5, 1981. Mr. Gropper twice went to Avon, South Dakota, at Zemliska's request to check the brands. Although Zemliska did not call Mr. Gropper to testify at the hearing, the investigation report, served on Zemliska before the hearing, contains a memorandum of a conversation Mr. Gropper had with an investigator from the Packers and Stockyards Administration. That memorandum indicates Mr. Gropper said the cattle he found in Avon were the same cattle he issued a market clearance for on December 5, 1981, after the auction at St. Onge.[2] The content of this conversation was corroborated by Mike Madden, owner and operator of the St. Onge auction market, who testified at the hearing that Mr. Gropper reported the same conclusion to him.[3] Further, Mr. Madden and his employees

also conducted an independent investigation which reached the same conclusion.

Zemliska himself testified to the effect that he found the majority of the 345 cattle he purchased at Torrington, Wyoming arrived at the Dahlquist feedlots. He specifically remembered only three head out of the 345 as not purchased by him because "they were older cows." (TR 169) Finally, The affidavit in the record from Lester W. Maxfield, owner and operator of the auction market in Torrington, contains Maxfield's statement that "it is my opinion that Mr. Zemliska loaded out on trucks the exact 345 head of cattle that he purchased." In sum, the preponderance of the evidence does not support Zemliska's uncorroborated contention that a significant number of the cattle found at Dahlquist's feedlots were not the same cattle he had purchased at St. Onge, South Dakota, and Torrington, Wyoming on December 4 and 5, 1981.

Zemliska also argues, in effect, that even if all the cattle did not conform to the order, Dahlquist and his agents initially took action inconsistent with rejection and failed to reject the cattle within a reasonable time. Both parties improperly cite Article 2 of the Uniform Commercial Code on sales in their arguments regarding this issue. Since the parties are not buyer and seller but rather are principal and agent as to each other, agency law, not sales law, governs this dispute. *See* UCC § 1-103 and *Manger* v. *Davis*, 619 P.2d 687 (Utah, 1980); *Cairo Co-op Exchange* v. *First National Bank of Cunningham*, 608 P.2d 1370 (Kan. 1980). Cast in agency terms, Zemliska is arguing that Dahlquist must be taken to have impliedly ratified his unauthorized purchase of non-conforming cattle by treating the livestock in a manner consistent with acceptance and by failing to reject the cattle until two to five days after delivery. That argument has no merit.

> The principal must have full knowledge of the unauthorized act of his agent and an opportunity to repudiate the same before any delay in repudiating the act in question can constitute a ratification thereof.
>
> * * * * * * *
>
> The principal does not ratify an unauthorized act if he repudiates it with reasonable promptness after learning the facts, instant repudiation not being essential to avoid ratification

2A C.J.S. Agency § 87, 89.

The Torrington cattle arrived in Avon, South Dakota, on Saturday, December 5, and the St. Onge cattle arrived on Monday, December 7, 1981, the same day Dahlquist's employee, Russell Hamilton, called him in Laurel, Nebraska to report that the cattle did not conform to the order. Russell Hamilton obviously did not have authority on his own motion to reject the cattle, or he would have done so without contacting his employer. Dahlquist personally inspected the cattle on Wednesday. He then immediately communicated rejection to Fjeldheim who in turn passed the word to Zemliska on Thursday morning, December 10. Under these circumstances, we find that repudiation of Zemliska's unauthorized act, that is, the purchase of non-conforming livestock, occurred with reasonable promptness after Dahlquist learned the facts.

Although Dahlquist's feedlot employees apparently initially treated the livestock in a manner which would have been consistent with acceptance by their employer, this treatment cannot be deemed acceptance, particularly in the absence of any showing that these employees had authority from Dahlquist to reject livestock purchased on order, or in the absence of any evidence that Zemliska was prejudiced either by the short lapse of time between delivery and rejection or by the treatment the cattle received while in Dahlquist's custody before rejection.[4]

In summary, Zemliska, in violation of instructions, purchased livestock which did not conform to the Dahlquist-Fjeldheim order and which were rightfully rejected by Dahlquist in a timely manner. Because Zemliska violated his order-buying instructions without justification, we hold that he, not Fjeldheim, is liable for losses and expenses incurred in connection with his purchase of the non-conforming livestock. 3 C.J.S. Agency § 288. The complaint will be dismissed as to those losses and expenses, which include the losses generated upon resale of the livestock, plus telephone, travel, brand inspection and trucking expenses incurred with respect to the livestock rightfully rejected by Dahlquist. This conclusion, based on the facts of this case, comports with record evidence show-

[4] The investigation report contains a memorandum to file by Dennis Thalacker, Packers and Stockyards Administration, memoralizing his interview of Oliver Dicken, auctioneer at Torrington Livestock Commission Co., Torrington, Wyoming. Mr. Dicken is reported to have compared various average cattle prices on December 4 and December 11, 1981, and to have concluded that "it was evident that the going price paid for various types of cattle had declined about $2.00 per hundredweight." If Mr. Dicken's conclusion was well-founded, it suggests a possible bad faith motive for rejecting the livestock. However, since Dahlquist was not called to testify and there is no other evidence on this point, on the basis of this record we must conclude that Dahlquist acted in good faith when he rejected on December 9 the livestock purchased by Zemliska on December 4 and 5.

ing that as a general rule in the livestock industry, a livestock order buyer bears the risk of loss for delivery of non-conforming livestock.

Fjeldheim received the proceeds from the sale of the 91 head of livestock which in fact conformed to the Dahlquist-Fjeldheim order. Failure to reimburse an agent for the full amount of the purchase price plus costs of livestock properly purchased on order constitutes an unjust practice in violation of the Act for which reparation may be awarded. *Frank Novy* v. *Western Iowa Farms Co., d/b/a Martin Bros. & Co.*, 33 Agric. Dec. 23 (1974); *Southwest Cattle Co.* v. *Betts*, 28 Agric. Dec. 426 (1969).

Fjeldheim concedes he owes Zemliska the following amounts:

$38,663.82	proceeds from resale of 91 head to Gary Erwin which reimburses Zemliska for the cost thereof and includes Zemliska's buying commission thereon
1,216.06	shipping cost for the 91 head
2,813.48	loss incurred upon resale of 36 head purchased on December 9, 1981
212.50	one-half of air fare for Zemliska's trip to Avon
$42,905.86	

From this amount must be deducted $26,658.30 which both parties agree Zemliska owes Fjeldheim for 113 cattle purchased on December 10, 1981, leaving a total of $16,247.56.

Fjeldheim claims an additional setoff of $11,875.28 for feed he contends Zemliska owes Dahlquist. However, Fjeldheim was not a party to the contract wherein Dahlquist agreed to feed cattle for Zemliska, nor has Fjeldheim become subrogated to Dahlquist's rights under that contract. Therefore, Fjeldheim is without standing to assert the purported feed bill of $11,875.28 as a setoff claim against Zemliska. Accordingly, Fjeldheim will be ordered to pay Zemliska as reparation $16,247.56 plus interest.

Three out of the subject 457 cattle died, one in transit to South Dakota for which Zemliska has received insurance compensation and two others after arrival at Dahlquist's feedlots. The record does not reveal whether or not these two conformed to the Dahlquist order. Since Zemliska has the burden of proving his damages, no reparation can be awarded for the two cattle which died after delivery to Dahlquist.

All contentions of the parties presented for the record have been carefully considered whether or not specifically mentioned herein.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, 42. F.R. 4395, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. §§ 450c–450g. It constitutes an "order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section, if respondents do not comply with this order within the time limit in this order, comlainant may within one year of the date of this order file in the district court of the United States for the district in which they reside or in which is located the principal place of business of respondents, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon appeal. That section further provides that if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file of this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On the Secretary's jurisdiction to issue this order, see discussion in *Neugebauer* v. *Ryken,* Civ. 74-4018, U.S.D.C., D. So. Dak., So. Div. 1975, 34 Agric. Dec. 1712; *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.,* 210 Nebr. 382, 315 N.W.2d 229, 41 Agric. Dec. 48 (1982).

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 CFR § 202.117.

On the respondents' right to judicial review hereof, see *Maly Livestock Commission* v. *Hardin, et al.,* 446 F.2d 4, 30 Agric. Dec. 063 (8th Cir. 1971). On complainant's right to judicial review hereof, see *United States* v. *I.C.C.,* 337 U.S. 426.

ORDER

That part of the complaint filed herein is dismissed which seeks recovery from losses and expenses incurred by complainant Leo Zemliska in connection with the rejection by Marlyn Dahlquist of all but 91 head out of 457 head of livestock purchased on order by complainant Leo Zemliska for respondents Glasgow Livestock Sales Co. and Robert D. Fjeldheim.

Within thirty days from the date hereof, respondents Glasgow Livestock Sales Co., its successors and assigns, and Robert D. Fjeldheim shall pay complainant Leo Zemliska as reparation the sum of $16,247.56 with interest thereon at the rate of 13 per cent per annum from February 1, 1982, until paid.

Copies hereof shall be served upon the parties.

COURT DECISIONS

ROBERT L. REEVES, CHARLES W. REEVES, JAMES C. REEVES *v.* UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE. Civil Action Nos. 85-1517, 85-1518, 85-1519. Decided May 28, 1986.

United States Court of Appeals District of Columbia

PETITIONS FOR REVIEW OF ORDERS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE: WALD and GINSBURY, Circuit Judges and RE, Chief Judge of the United States Court of International Trade (sitting by designation).

JUDGMENT

These consolidated petitions for review of decisions of the Administrator of the Agricultural Marketing Service were briefed and argued by counsel for the parties. The court has considered the issues petitioners present and finds they occasion no need for a further opinion. *See* D.C. Cir. R. 13(c).

Our review of the record satisfies us that petitioners have failed to demonstrate that they are not "responsibly connected" with a dealer. Unlike *Quinn* v. *Butz*, 510 F.2d 743 (D.C. Cir. 1975), and *Minotto* v. *U.S. Dep't of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983), petitioners here are in no sense subordinate to or under the control of the principal actor in the company in question. The evidence amply shows that petitioners acted of their own volition, and became affiliated as directors and stockholders of Reeves Produce because they believed the business would yield them a profit. The evidence further shows that they failed to exercise due care to determine whether Reeves Produce was being managed in accord with legal requirements imposed by the Perishable Agricultural Commodities Act. It is therefore

ORDERD and ADJUDGED that the petitions for review are denied and the decisions of the Administrator are affirmed.

Per Curiam

REEVES PRODUCE, INC. *v.* UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, CIVIL ACTION NO. 85-1602. DECIDED MAY 28, 1986.

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.

Before: WALD and GINSBURY, Circuit Judges and RE, Chief Judge of the United States Court of International Trade (Sitting by designation).

JUDGMENT

This petition for review of a decision of the Secretary of Agriculture was briefed and argued by counsel for the parties. The court has considered the issues petitioner presented and finds they do not merit a further opinion. *See* D.C. Cir. R. 13(c).

Substantial evidence, summarized in the findings and conclusions of the Administrative Law Judge and Judicial Officer, fully supports the determination that Reeves Produce committed flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4). Furthermore, the record evidence plainly warrants the sanction ordered. It is therefore

ORDERED and ADJUDGED that the petition for review is denied and the decision of the Secretary is affirmed.

Per Curiam

DISCIPLINARY DECISIONS

In re: TED SOBIECH. PACA Docket No. 2-6902. Decided May 8, 1986.

Failure to pay promptly—License suspended—Consent.

Edward M. Silverstein, for complainant.
Jeffrey D. Sherwin, Middletown, New York, for respondent.

Decision by John A. Campbell, Chief Administrative Law Judge, for Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 24, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April 1984 through February 1985, respondent purchased, received and accepted, in interstate commerce, from nine sellers, 39 lots of onions, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $144,723.41.

A copy of the complaint was served upon respondent. On August 28, 1985, an answer was filed by respondent in which he denied violating the Act as alleged by complainant. Complainant moved for the setting of a definite date for hearing, and, on February 20, 1986, the matter was set down for hearing on April 1, 1986, in New York City, New York. A prehearing conference, by telephone, was held on March 13, 1986. Complainant's counsel appeared at the April 1, 1986, hearing and reported that, at 11:15 the previous evening, the parties had agreed to settle this matter without hearing. Therefore, with the consent of the parties, the following Decision and Order is issued.

FINDINGS OF FACT

1. Respondent, Thaddeus J. Sobiech t/a Ted Sobiech, is an individual, whose mailing address is Box 158, Pine Island, New York 10969.

2. Pursuant to the licensing provisions of the Act, license number 152721 was issued to respondent on June 29, 1954, was renewed annually, presently is in effect, and is subject to renewal on or before June 29, 1986.

3. As more fully set forth in paragraph 5 of the complaint, during the period April 1984 through February 1985 respondent purchased, received and accepted in interstate commerce, from nine sellers, 39 lots of onions a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $144,723.41.

4. The amounts due and owing the nine sellers referred to in paragraph 3 above has now been paid, and respondent appears to be current in his payments to his suppliers.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 39 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is suspended for 80 days.
This Order shall take effect on May 15, 1986.
This Decision will become final upon its issuance.
Copies hereof shall be served upon the parties.

In re: TED SOBIECH. PACA Docket No. 2-6902. Decided May 19, 1986.

Correction of decision—Consent.

Edward M. Silverstein, for complainant.
Jeffrey D. Sherwin, Middletown, New York, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CORRECTION TO CONSENT DECISION

The oral hearing was held herein on April 1, 1986, during which a settlement agreement was reached on the record. Same was to be reduced to writing and presented to the Administrative Law Judge. This was not done until May 7, 1986, at a time when the Judge was out of town on another hearing and the Consent Decision was signed in her absence.

Paragraph 4. thereof is hereby corrected to read:

> The amounts due and owing the nine sellers referred to in paragraph 3 above have now been paid, and respondent appears to be current in his payments to his suppliers.

Copies hereof shall be served upon the parties.

In re: H & J BROKERAGE, INC. PACA Docket No. 2-6437. Decided May 22, 1986.

Appeal of denial of application for license—Denial affirmed.

The Judicial Officer affirmed Judge Baker's decision denying respondent's application for a license on the ground that Mr. Scharf, respondent's president, treasurer, and 75% stockholder, played a major role in the failure of Fresh World, Inc., to pay 20 shippers for over $331,000 worth of produce. Although Mr. Scharf was not solely responsible for Fresh World's failures to pay, he was general manager of Fresh World and was primarily responsible for its sales to Central Produce, whose failure to pay $242,000 to Fresh World was a major factor in Fresh World's failure to pay its suppliers. It is immaterial that Mr. Scharf was not "responsibly connected" with Fresh World, as that term is defined in the Act. Explanation as to when a "responsibly connected" determination is relevant. It is only necessary for complainant to show that Mr. Scharf engaged in practices of the character prohibited by the Act. The inclusion of a term in one section of the Act, while omitting it in another, emphasizes that it should not be implied in the place where it was omitted. The Act has been interpreted in a tough and harsh manner, with the support of the industry. Excuses are routinely rejected in failure to pay and failure to pay promptly cases. Once complainant establishes that Mr. Scharf engaged in practices of the character prohibited by the Act, the burden of proof is on respondent to show that it is fit to receive a license. It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy. In a hearing conducted at intervals, there is little or no basis for respondent's complaint as to the adequacy of the administrative complaint. The ALJ should require the parties to number the pages of multi-page exhibits.

Dennis Becker, for complainant.
Burton I. Manis, Boca Raton, Florida, for respondent.
Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on July 24, 1985, denying respondent's application for a license on the ground that Donald Scharf, who is respondent's president, treasurer, only director, and 75% stockholder, played a major role in the failure of Fresh World, Inc.,

* *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

to pay 20 shippers for over $331,000 worth of produce from June 1983 through September 1983.

On December 9, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 25, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order, with material added by the Judicial Officer included in brackets. In addition, a few trivial changes not included in brackets have been made. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is an administrative action brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter sometimes referred to as the "PACA." It arises by reason of a Notice to Show Cause filed on December 12, 1983, wherein it is alleged that the Application of Respondent corporation, a New Jersey corporation, filed on November 14, 1983, reflects that Donald Scharf is the president, treasurer, director and holder of 75 percent of the outstanding stock of said H & J Brokerage, Inc. It is further alleged that said Donald Scharf was president and/or general manager and/or director of Fresh World, Inc., a California corporation, holding a PACA license certificate, and that said Fresh World, Inc. allegedly violated Section 2(4) of the PACA (7 U.S.C. 499b(4)) during the period June 1983 through September 1983 by failing to make full payment promptly to 20 sellers of the agreed purchase prices, or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultur-

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

al commodities purchased, moved, and accepted in interstate or foreign commerce.

The Notice to Show Cause further alleges that during the period June 1983 through September 1983, Donald Scharf, acting as general manager, made all decisions regarding from whom Fresh World, Inc. would purchase and to whom it would sell perishable agricultural commodities. It is further stated that during the above period, Donald Scharf sold to Central Produce Corp., San Juan, Puerto Rico, substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp. to Fresh World, Inc. of more than $300,000.00 to accrue. It is further alleged that Central Produce has failed and refused to pay this indebtedness. Until August 9, 1983, it is stated that Donald Scharf had authority to issue checks for Fresh World, Inc.

The reason stated that the issuance of a license to Respondent, H & J Brokerage, Inc., has been withheld is because Mr. Scharf is the Respondent corporation's president, treasurer, director, and holder of 75 percent of the outstanding stock and it is alleged that Mr. Scharf as president, director, and/or general manager of Fresh World, Inc. is responsible for the commission of violations of PACA in that:

Section 2(4) of the PACA (7 U.S.C. 499b(4)) provides as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> (4) For any commission merchant, dealer or broker, to make for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail, or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

And that, during the period June, 1983, through September, 1983, Fresh World, Inc. violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of

the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce.

Despite these clear assertions in the Complaint, the Complainant, on brief, and through the evidence which it either adduced, or sought to admit into evidence, seeks to enlarge upon the reasons why the Respondent should not be granted a license under the PACA. This is done through reference to Mr. Scharf's prior associations with other firms with which he has been associated. It should be remembered that this is not an action against Fresh World, Inc. nor the determination of responsibility of that entity, and its officers, and shareholders as to the requirement of payment to its suppliers. However, official notice is taken herein of a Default Decision against Fresh World, Inc., PACA 2-6526 (October 4, 1984).

As will be set forth more fully hereinafter, the Secretary of Agriculture has a wide area of discretion with respect to the granting of licenses, and if there is legally sufficient basis for his denying a license application, then, a substitution of judgment is not appropriate.

Further, it is alleged in the Notice to Show Cause, that:

> "Section 9 of the PACA (7 U.S.C. 499i) requires that records of business transaction by commission merchants, dealers and brokers be maintained so as fully and correctly to disclose all transactions involving perishable agricultural commodities. On information and belief, Mr. Scharf either caused records pertinent to the transactions set forth * * * above, not to be maintained, or took such action which has made them unavailable for inspection by the Department, in violation of the PACA and regulations issued thereunder."

Also the Notice to Show Cause relies upon the Statutory provision:

Section 4(d) of the PACA (7 U.S.C. 499d(d)), in pertinent part, provides as follows:

> (d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, . . . or in case the applicant is a corporation, any officer or holder of more than [1] 10 per centum of the

[1] There was an error of omission in the quote in Paragraph 9 of the Complaint.

> stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . the Secretary may refuse to issue a license to the applicant.

The Respondent maintains that it is entitled to the license for which application has been made and in support thereof alleges that although Donald Scharf was named as the president on the license of Fresh World, Inc., a California corporation, he never acted as such; that in a letter sent to the United States Department of Agriculture under date of March 23, 1983, Donald Scharf requested that his name be removed as president of Fresh World, Inc.; that on March 29, 1983, David Dixon took over the ownership of Fresh World, Inc. and received the majority of the stock of Fresh World, Inc., it being Respondent's information and belief that Karl Allen retained a minority ownership of the stock of Fresh World, Inc.; that although Donald Scharf acted as manager of Fresh World, Inc., from March 29, 1983, to the early part of August, 1983, said management was subject to the control and direction of David Dixon; and that in the early part of August, 1983, and without hisknowledge, Donald Scharf's authority to sign checks was withdrawn from the bank by David Dixon who handled the financial matters of Fresh World, Inc. It is further alleged that David Dixon made the managerial decisions of Fresh World, Inc. from June, 1983, to September, 1983.

The first session of the oral hearing commenced on February 8, 1984, and continued to February 9 and 10, 1984, in San Francisco, California. Pursuant to agreement of the parties, the hearing continued thereafter on April 4 and 5, 1984, in San Francisco, California.

The oral hearing was held before Administrative Law Judge, Dorothea A. Baker. The Complainant was represented by Dennis Becker, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250, and the Respond-

ent was represented by Eugene Epstein, Esquire, Shostak, Epstein and Boyd, 144 West Gabilan Street, P.O. Box 2164, Salinas, California, 93902.

The last brief was filed herein on September 17, 1984.

FINDINGS OF FACT

1. Respondent, H & J Brokerage, Inc., is a New Jersey corporation with a business address at 1287 North Main Street, Suite 109, Salinas, California, 93909, and on November 14, 1983, filed a license application which, if issued, would authorize H & J Brokerage, Inc. to engage in the business of handling fruits and vegetables or perishable agricultural commodities in interstate or foreign commerce as a dealer or broker.

2. That license application reflects that Donald Scharf is the President and Treasurer, a 75 percent stockholder, and the only director of Respondent. Said License application further reflects that the other 25 percent of the stock is held by Howard Chaplin, M.D. Donald Scharf also currently holds a license to do business as H & J Brokerage, which is a sole proprietorship.[2]

3. Pursuant to the licensing provisions of the PACA, license No. 820039 was issued to Fresh World, Inc., on October 14, 1981, and was renewed in 1982, but was allowed to lapse when it was due for renewal in October, 1983.

4. The Secretary of Agriculture has jurisdiction of the subject matter of this proceeding.

5. On December 12, 1983, the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, issued a "Notice to Show Cause" indicating that the issuance of a license to H & J Brokerage, Inc. was withheld at that time pursuant to Section 4(d) of the PACA inasmuch as Donald Scharf had allegedly engaged in practices in violation of the Perishable Agricultural Commodities Act.

6. The "Notice to Show Cause" reflects that the only allegation of wrongdoing on the part of Donald Scharf is that by reason of his association and position as general manager, during the period June, 1983, through September, 1983, the corporation known as Fresh World, Inc., a California corporation, whose mailing address is P.O. Box 4550, Salinas, California, 93912, failed to make full payment promptly to 20 sellers of the agreed-upon purchase prices, or balances thereof, in the total amount of $331,194.55 for 85 lots of

[2] In this proceeding the Secretary does not seem to object to the holding by Mr. Scharf of a license as a sole proprietor but asserts that the corporate "cloak" would allow, or be conducive to, unpaid creditors, without personal liability.

perishable agricultural commodities in interstate or foreign commerce and that Mr. Scharf "permitted" [3] an indebtedness of over $300,000.00 to accrue from Central Produce Corp., as well as an allegation pertaining to the failure to keep, maintain, and make available pertinent records.

7. The evidence establishes, and it is not disputed, that the amounts set forth in the Notice to Show Cause, or substantial portions thereof, remained unpaid by Fresh World, Inc., at the time of the oral hearing. Once the corporation, Fresh World, Inc., closed down its business in September, 1983, and the accounts receivable were taken by Mr. Dixon, and the accounts payable were either placed in storage or were unaccounted for, it cannot be ascertained if any of the amounts collected by either the Bank or Mr. Dixon were ever used to pay any of the accounts payable, although there may have been some small payments. However, several trades people testified as to the non-payments of their accounts.

8. Essentially, the Complainant frames the dispute herein as one concerning whether or not Mr. Donald Scharf was responsible for non-payment to the vendors of the amounts set forth in Paragraph 6 of the Notice to Show Cause. A principal witness, appearing on behalf of the Complainant, was Mr. Dixon, a majority owner of Fresh World, Inc., from at least March, 1983, who indicated that Mr. Scharf had the responsibility for the non-payment of the accounts. Mr. Scharf, the applicant/Respondent herein, maintains that the unpaid indebtednesses were attributable to persons other than him.

mutual acquaintance, Mr. Scharf became aware of Fresh World, Inc. during the latter part of June, 1982. The mutual acquaintance indicated that Fresh World, Inc. needed someone to buy and sell produce. Mr. Scharf met with Terry Allen, who was the President of Fresh World, Inc., during June, 1982, and as a result of discussions and a consultant-employment arrangement, Mr. Scharf commenced employment with Fresh World, Inc. during the last week of June, 1982. The initial employment arrangement was that Mr. Scharf would be employed as a consultant for 12 weeks at a salary of $1,000.00 per week, plus car allowances and medical insurance. Mr. Scharf had never been a seller or broker of produce before this employment [, but he has been in the produce business for 29 years, including buying for supermarket chains (Tr. 106, 781-82, 806-16), and he bought and sold produce for Amigo Foods (Tr. 806)]; Mr. Scharf did not have any responsibilities for the financial records of Fresh World, Inc., nor did he even look at them during the period when Terry Allen ran the corporation.

11. Early in the existence of Fresh World, Inc., Karl Allen received $15,000.00 from Fresh World, Inc. which he stated he considered repayment of funds advanced by him for the incorporation of Fresh World, Inc. During the latter part of 1982, Mr. Karl Allen indicated that he became concerned about his investment, and in December, 1982, Karl Allen, through the corporation's Treasurer, and his brother, Terry Allen, caused corporate funds to be distributed to him in the amount of $25,000.00. He still retained his 25 shares in the corporation. Even if Karl Allen's premise is correct that all he was doing was withdrawing his investment in the corporation, it conflicts somewhat with his theory that what he did was to make loans to the other three investors. Also, inasmuch as Karl Allen still retained his 25% interest in the corporation, the difference between $40,000.00 withdrawn and the $30,000.00 invested would be attributable to earnings of the corporation in the absence of evidence to the contrary.[3a]

12. Basically, the Complainant maintains that Respondent is unfit to receive a PACA license because Fresh World, Inc. did not pay its bills, and that Mr. Scharf was knowing, or permissive thereof. However, dilution of the earnings and/or capitalization of a company can also be a factor as to why it does not pay its creditors. Although neither party on brief addresses the situation, there is,

[3a Mr. Dixon considers the $40,000 withdrawal of funds by Karl Allen to be illegal (Tr. 357-63, 403-04), and he plans to institute an action against the Security Pacific Bank for $25,000 of that amount, because the $25,000 check was signed by Terry Allen, who was not authorized at that time to sign checks (Tr. 359, 488), and to recover the other $15,000 from Karl Allen (Tr. 488, 492-93).]

nevertheless, some evidence of record that there was a transaction involving a company referred to as Tamarack. The evidence in this regard is not sufficient to form any conclusions, but there is some testimony to the effect that Cameron Dale was a force in causing the Tamarack entity to provide collateralization for cash made available to Fresh World.

Undisclosed facts relating to the Tamarack corporation, of which Mr. Al Olson and Mr. Bob Paul were principals, preclude any determination as to the effect, if any, which the issuance of some 500 shares of stock of Fresh World, Inc., for the supplying of security for a $35,000.00 loan, and the subsequent surrender of such stock, as well as other matters associated with same, may have had on the financial aspects of Fresh World.

13. Mr. David Dixon became involved with Fresh World, Inc. in January, 1983. He became President of the corporation in March, 1983, by election of the Board of Directors, which consisted of himself and another individual. Mr. Dixon indicated that he first became aware of Fresh World through Cameron Dale whom he had known for approximately three years.

14. Mr. Dixon has been a principal stockholder of ten closely held corporations within the past fifteen years, including being the President and owner of Food Tech, Inc., and Food Source, Inc.

15. Mr. Dixon acquired 75 percent, or 75 shares of the stock of Fresh World, Inc. [in consideration for obtaining and guaranteeing a $500,000 line of credit for Fresh World]; and, Food Source, Inc., a corporation controlled by Mr. Dixon provided Fresh World, Inc., $70,000.00 [as a loan] in February, 1983.[*] No promissory note was received for these funds, and the $70,000.00 was subsequently withdrawn from Fresh World by Mr. Dixon, and paid to Mr. Dixon by the end of July, 1983.

16. Mr. Dixon sought to acquire the 100 shares outstanding in order to effectuate the total ownership of Fresh World, Inc.; however, Mr. Cameron Dale from whom Mr. Dixon acquired three signed certificates of stock, the signatures of which were not guaranteed,

[* Respondent's Proposed Findings of Fact, Conclusions, and Order filed August 22, 1984, states (p. 5):

> 15. DAVID DIXON acquired 75 percent or 75 shares of the stock of FRESH WORLD, INC. in exchange for his agreement to furnish a line of credit of $500,000.00 through SECURITY PACIFIC BANK to FRESH WORLD, INC. (Tr. 356)
>
> 16. FOOD TECH, a corporation controlled by DAVID DIXON loaned FRESH WORLD, INC. $70,000.00 in February 1983. (Tr. 360) No promissory note was received for this loan. (Tr. 361) $70,000.00 was repaid to DIXON by the end of July 1983. (Tr. 401)]

was unable to persuade Karl Allen to relinquish his stock. The 75 share acquisition was apparently done through Mr. Cameron Dale; Food Source, Inc. [and Mr. Dixon guaranteed payment of the $500,000 line of credit from Security Pacific National Bank, which was the consideration for the acquisition of the 75 shares. Under the line of credit, the bank agreed to loan Fresh World 70% of its "eligible" accounts receivable (i.e., those regarded by the bank as collectible).]

17. During the period January, February and March, 1983, Mr. Dixon had conversations with Mr. Scharf relating to matters pertaining to the corporation and with bank officials relative to the establishment of a line of credit from Security Pacific [referred to in Findings 15 and 16]. Fresh World was already doing business with the bank, and already indebted thereto. It was at this time that Terry Allen ordered Mr. Scharf to sign a collateral agreement as President of Fresh World. Mr. Scharf did not regard himself as President of Fresh World but was ordered to do this by Mr. Allen. Nevertheless, he acted in such capacity and held himself out to third persons as being President. Any third party has the right to rely upon officership as represented.

18. Prior to Mr. Dixon's acquisition of Fresh World, he reviewed numerous financial documents pertaining to its financial condition and knew of its negative net worth. Several of these documents consisted of unaudited statements. [However, in January 1983, when Mr. Dixon first looked at Fresh World's financial statement for December 31, 1982 (which shows "Total Capital" of $13,880.41 (CX 2, p. 2)), he understood that "Fresh World, Inc. had a net worth of approximately $14,000" (Tr. 485-86). Based on that understanding, his corporation (Food Source, Inc.) loaned $70,000 to Fresh World (see Finding 15). In the latter part of February 1983, Mr. Dixon received Fresh World's January 31, 1983, financial statement that was prepared on an accrual basis with accounts receivable judged to be uncollectible removed, and it showed "the company then moving to $125,000 negative net worth" (Tr. 161), actually negative $124,836.07 (CX 4, p. 2). Mr. Dixon was "angry at the fact we had already put money into the company on the basis of financial statements that Mr. Scharf had given me earlier showing a stronger company" (Tr. 161). Nonetheless, since Mr. Dixon was convinced by Cameron Dale and Mr. Scharf that Fresh World "could do much better" if capital were infused into the company (Tr. 963; see also Tr. 105, 107-08, 158-60), he subsequently provided the $500,000 guarantee resulting in his "acquisition" of Fresh World (see Findings 15-17).]

19. Mr. Dixon was furnished various Accountants' Compilation Reports which contained, among other things, the statements:

> A Compilation is limited to presenting in the form of Financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.
>
> Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters.

20. Mr. Dixon, prior to becoming President of Fresh World, Inc. caused the accountants, the Kemper Group, to convert the method of accounting from a cash basis to an accrual basis. Mr. Dixon believed that some of the accounts receivable were not good accounts, and should be eliminated so as to more correctly reflect the financial status of the corporation. The record does not disclose whether any of the eliminated accounts receivable were ever collected.

21. Mr. Scharf was hired by Mr. Dixon to buy and sell produce. Mr. Scharf received his instructions from Mr. Dixon as to the presentment of the invoices to Security Pacific Bank to receive advances on the accounts receivable.

22. Mr. Scharf bought and sold produce and acted as a broker for Fresh World, Inc.—he kept a record of each transaction in a separate folder which contained all the documents connected with each transaction. From time to time there were one or two other salesmen employed by Fresh World and each of them kept track of his own transactions. The record evidence does not disclose which, if any, of the unpaid creditors were the result of transactions with salesmen, other than Mr. Scharf.

23. Considerable evidence was adduced as to the financial situation of Fresh World, Inc. at the time of the stock acquisition by Mr. Dixon, who apparently turned the stock over to Food Source, Inc., which acted as a guarantor for the then existing liability of Fresh World, Inc. Despite the fact that apparently Food Source had the stock, nevertheless, Mr. Dixon did not believe that it had a positive value, and never entered it as an asset on the books of the corporation. In fact, according to advice which he said he obtained, Food

Source did not reveal either its contingent liability to the bank, or the asset value of the stock of Fresh World. Without having such items on its books, a potential creditor, etc. of Food Source would be unaware of such items.

24. Both Mr. Dixon and persons associated with him were sophisticated businessmen. Mr. Scharf had a high school education and was under a doctor's care [,i.e., he was seeing a psychologist twice a week (at Fresh World's expense) (Tr. 882, 966-69, 985-87).]

25. Complainant seeks to draw some sort of negative inference from Mr. Scharf's salary and other renumeration from the corporation, such as, that he was receiving, admittedly $1,500.00 salary per week and benefits which complaint alleges amount to $100,000.00 a year while other salesmen [for Fresh World] were receiving amounts of $15,000.00 and $20,000.00. By reason of this difference, the Complainant argues that Mr. Scharf was not a "mere salesman". This may be so, but there is nothing in the persuasive evidence to prove otherwise—i.e., that his salary was excessive, for instance there was no comparison of sales, results, duties, either intra-company or inter-company. Perhaps if such evidence were adduced it might be shown that salesmen with Mr. Scharf's background and ability to generate business might make more than he received. [From March 1983 through August 1983, Mr. Scharf was "General Manager" of Fresh World (CX 24, p. 3; Tr. 1009);[3c] he bought and sold produce without control as to prices, suppliers or

[[3c] Mr. Scharf at first denied that he was general manager of Fresh World. He testified (Tr. 950):

> Q. Did you ever consider yourself to be the general manager?
>
> A. There really wasn't a title addressed to myself.
>
> Q. Did you ever consider yourself to be the general manager?
>
> A. No.

However, Mr. Scharf later admitted that he was Fresh World's general manager, testifying (Tr. 1009-10):

> Q. From March of 1983 through August of 1983 did you ever have a title?
>
> A. Yes.
>
> Q. What was it?
>
> A. General manager.
>
> Q. Where did you get that title?
>
> A. Mr. Dixon gave it to me.

Similarly, Mr. Scharf stated in an affidavit (CX 24, p. 3) which he signed on November 25, 1983, after consulting with counsel (Tr. 1032-35):

> While I was employed at Fresh World, Inc., I was General Manager and worked with Jeff Leonard, a Salesman.]

customers (Tr. 1008-10; see also Tr. 109, 412-13, 787, 907-08, 964-65, 973-74);[3d] he had authority to hire and fire employees (Tr. 109, 687, 975, 988); he signed numerous bank documents (even prior to March 1983) (CX 15; Tr. 884-904), and starting in April 1983 he signed the documents that obtained the loans from Security Pacific Bank on the $500,000 line of credit (Tr. 789-91, 960-61, 970-71); and until August 9, 1983, he was authorized to sign (and signed) Fresh World's checks (Tr. 672, 907-08, 976, 1027), including salary checks (Tr. 787-88, 950), and checks to vendors and for other payables (Tr. 787-88, 965, 974).]

26. On or about the time that Mr. Dixon took over the ownership of the corporation, Miss Judy Allwardt came to Fresh World, Inc., as the bookkeeper and office manager, at first working on a part time basis and later on a full time basis. She previously had been employed by Mr. Terry Allen. Miss Allwardt subsequently left Fresh World, Inc., for a better position on or about August 10, or 11, 1983. She was replaced by Miss Leddemer. Miss Allwardt helped Miss Leddemer close the books for July, 1983. This was done the first half of August, 1983. In the [latter] part of [July], 1983, when Mr. Scharf wrote a check to himself [for $20,000, believing that he was entitled to 50% of the profits (Tr. 983-94)], Miss Allwardt caused Mr. Dixon to be informed [i.e., she told a lady at the bank, who relayed the information to a bank officer, who, in turn, told Mr. Dixon], and payment on the check was stopped [, but it was never negotiated since Mr. Dixon told Mr. Scharf that he was not entitled to the money. (Tr. 199-201)]

27. Miss Allwardt was in charge of the accounting aspects of the operation of Fresh World, Inc. Donald Scharf bought and sold produce and directed her to pay the vendors, and until his authority to do so was revoked, Mr. Scharf signed the checks therefor.

28. After becoming involved with the corporation, Mr. Dixon took steps to obtain a $500,000.00 line of credit with the Security Pacific Bank. [referred to in Findings 15-18, 25]. The bank utilized its normal banking procedural methods for an extension of a line of credit, whereby the accounts receivable are hypothecated as security, and such receivables were reviewed on a constant basis by the

[3d] Mr. Dixon testified that he told Mr. Scharf in July 1983 that the bank had refused to lend any more money on Central Produce accounts receivable and that Mr. Scharf should cut back the sales to Central Produce and collect the monies owed (Tr. 188, 475-76). Mr. Scharf admits that Mr. Dixon told him in the latter part of June or the early part of July that the bank would not loan additional money on the Central Produce receivables, but he testified that Mr. Dixon told him to continue selling as much merchandise as he could to Central Produce (Tr. 992). The ALJ did not resolve this conflict (see Finding 39).]

bank. The agreement for the line of credit agreement was signed in March, 1983, and that agreement was guaranteed by Food Source, Inc. and Mr. Dixon, personally. Before the close of the hearing, it was disclosed that in order for Security Pacific to recover the amount of its advances to Fresh World, Inc., Security Pacific had instituted legal proceedings against Fresh World, Inc., Food Source, Inc., and Mr. Dixon, personally.

29. The bank indicated that as of November, 1983, it wanted Fresh World's receivables out of its portfolio although the said receivables could be put back in December [(Tr. 209); i.e., the bank wanted the accounts receivable line of credit paid up by November 1983 (Tr. 456).] During the period March, 1983, through September, 1983, the bank had extended close to the $500,000.00 line of credit on the basis of the monthly gross volume of business evidenced by the accounts receivable, which included the account of Central Produce.

30. Utilizing its standard banking procedures, the accounts receivable were reviewed on a constant basis and those which were older than ninety days were regarded as ineligible to be carried in the security portfolio. In approximately June of 1983, Security Pacific decided not to loan anymore against Central Produce receivables and this was [because the bank did not want to have more than "a 20 percent exposure for any one particular account, . . . and Central Produce's account exceeded that 20 percent" (Tr. 992).]

31. The documents that were submitted to Security Pacific [to obtain loans from the $500,000 line of credit referred to in Findings 15-18, 25, and 28-30] were prepared by Miss Allwardt, and she was responsible for that part of the operation of the company, although they may have been submitted to the Bank by Mr. Scharf, [and the documents submitted to the bank from April through August 1983 were signed by Mr. Scharf (Tr. 789-91, 960-61, 970-71).]

32. Donald Scharf was a signatory on the checking account of Fresh World, Inc. until his authority was removed by Mr. Dixon on August 6 [or 9], 1983. Mr. Scharf learned of this removal from the signature card at the bank on August 19, 1983. Not knowing that his signature had been removed, Mr. Scharf, between August 6 [or 9], 1983, and August 19, 1983, had signed several checks payable to vendors. When he talked to Mr. Dixon about this he was told that Mr. Dixon was President of the company, and that was the way he wanted it. The bookkeeper was not informed of the removal of Mr. Scharf's authority [, although she was told in August that Mr. Dixon wanted the checks prepared for his signature (Tr. 203-05, 397-99, 409, 413, 674-78).]

33. According to evidence of record, as of August 30, 1983, there were accounts receivable of $689,000.00 [, $523,426.95 of which were "eligible" accounts receivable (CX 13, p. 1, line 10)]; and, there was sufficient money in the account of Fresh World, Inc., to pay the vendors for the produce purchased by Donald Scharf. [Fresh World's loan balance owed to the bank on August 30, 1983, on the $500,000 line of credit referred to in Findings 15-18, 25, and 28-31 was $366,398.37 (CX 13, p. 1, line 19).] When Mr. Scharf was signing checks all of the vendors were paid as the obligations became due [, except that some of his checks bounced after his check signing authority was removed on August 9, 1983 (e.g., Tr. 81-86, 273-74, 318; CX 1, 17, 20).]

34. Mr. Dixon established a new procedure for payment of the vendors [in August 1983]. The checks were to be mailed to him in Larkspur, and then he would sign them and mail them directly to the creditors. However, Mr. Dixon, although receiving them, did not mail [many of] the checks to the creditors [, but about 25 to 50 creditors were paid by Mr. Dixon (Tr. 409, 413, 676-78).] The file containing the unsigned checks is said to be lost.

35. As the evidence clearly shows, times before and after, when produce suppliers were not being paid promptly, the funds of the corporation, Fresh World, Inc., were being depleted by the $70,000.00 withdrawn by Mr. Dixon (as repayment [of the loan referred to in Finding 15]) over the months of March through June or July, 1983. Also, after the removal of Mr. Scharf['s check signing authority], and at a time when the company's books reflected large amounts of unpaid creditors, Mr. Dixon withdrew $20,000.00 for "management" fees, and another $100,000.00 from the operating account of the corporation, (of which others were unaware) which he caused to be deposited in a separate bank account at the First Interstate Bank, subject to his signature, as well as others.

36. On August 30, 1983, $17,447.32 was deposited into the account of Fresh World, Inc., as an advance on the accounts receivable line of credit. On September 13, 1983, $24,135.04 was deposited by Security Pacific Bank into the account of Fresh World, Inc.

37. On August 22, 1983, David Dixon drew a check on the account of Fresh World, Inc., to pay an obligation to Cessna, Inc., for an airplane owned by him. The amount of the check was $7,098.00.

38. A contention, crucial to the position of the Complainant, is that Mr. Scharf "knew", "permitted", or otherwise encouraged a debt accumulation of a Puerto Rico concern by the name of Central Produce, in the sum of approximately $300,000.00; that if Mr. Scharf had not dealt with this concern, or had effectuated payment of its account, then the creditors of Fresh World would have been

paid. It is true that Mr. Scharf was responsible for bringing The Central Produce Co., account to Fresh World, and that the majority of the business transactions were purchase and sale transactions as opposed to brokerage transactions. The extent and nature of Mr Scharf's knowledge of the payment practices of Central Produce was not sufficiently proven by the record evidence. [However, Mr. Scharf admittedly was aware of the large increase in Central Produce's debt while it was happening (Tr. 991).] Also, who were the owners, stockholders, directors, the corporate charter, minutes, etc. of Central Produce were not proven of record by either party, and no findings of fact can properly be made thereto.[36]

[Note: Finding 38(a)–(d) is added by the Judicial Officer]

[38(a) Mr. Scharf brought the Central Produce account to Fresh World as a result of his knowledge of Central Produce before joining Fresh World. Before joining Fresh World in 1982, Mr. Scharf worked for Amigo Foods in 1980 as a buyer and seller of produce (Tr. 806–07). Amigo Foods was owned by Harry Krupnick, and Robert Krupnick also worked there (Tr. 804). Amigo Foods sold produce to Central Produce, but Mr. Scharf was not personally involved in sales to Central Produce (Tr. 806).

[(b) In 1980 and 1981, Robert Krupnick went into business as Watermill Export Company in Scarsdale, New York (Tr. 808–09). Mr. Scharf went with him and worked for Watermill from the time it first started in business (Tr. 809). Watermill had six employees, a controller, three secretaries, Robert Krupnick and Mr. Scharf (Tr. 812–13). Mr. Scharf bought produce for Watermill and Robert Krupnick bought and sold produce for Watermill (Tr. 813). *Mr. Scharf knew that Watermill sold only to Central Produce, i.e., that all of the produce bought by Robert Krupnick and Mr. Scharf was sold to a single customer, viz., Central Produce and its subsidiaries* (Tr. 814). On occasions, when Robert Krupnick was not there, Mr. Scharf would talk to Pepe Fillgara of Central Produce about invoices and merchandise (Tr. 819–20).

[36 The ALJ did not accept Mr. Dixon's testimony that Mr. Scharf told him that Central Produce was partly owned by Mr. Scharf's friend and former employer, Robert Krupnick, who had been the silent 50% owner of North American Produce Distributors with Cameron Dale (Tr. 188–89). Mr. Scharf denied discussing Central Produce's ownership with Mr. Dixon (Tr. 791). Mr. Scharf did, however, admit that when he sold produce for Fresh World to Central Produce, Central Produce at times wanted the transportation handled by Luallipam, and that Robert Krupnick was one of the persons at Luallipam with whom he dealt (Tr. 858–61, 1005–08). Luallipam was located at the same address in Scarsdale, New York, where Watermill (see Finding 38(b), *infra*) had been located (Tr. 859).]

[Mr. Scharf testified that he was "told" that he was vice president of Watermill (Tr. 815), but he wrote to the Department of Agriculture on March 4, 1982, stating that "effective March 4, 1982, I, Don Scharf, am resigning my position as vice president and officer of Watermill Export, Inc." (CX 23).

[Watermill's PACA license was automatically suspended on April 23, 1982, because it failed to satisfy a reparation award issued against it. *In re Watermill Export, Inc.*, 41 Agric. Dec. 1781, 1782 (1982). Mr. Scharf was not aware of that suspension (Tr. 854–55). Subsequently, Watermill's license was revoked on September 16, 1982, because it failed to pay promptly for $828,370.57 worth of produce, $292,265.82 of which remained unpaid (Tr. 811, 854; *In re Watermill Export, Inc.*, 41 Agric. Dec. 1781, 1781–82 (1982)). Mr. Scharf testified (Tr. 993):

> A. I didn't know exactly why Watermill went under because I was here in California when I read in the Packer [a trade magazine] about Watermill. I didn't know anything about what was happening as far as their financial problems.

[(c) After leaving Watermill in March 1982, Mr. Scharf was engaged in April 1982 by Steven L. Gilfenbain to do a feasibility study of going into the gourmet-type food operation in California (Tr. 815, 831–32). While working in California, Cameron Dale came to see Mr. Gilfenbain about a trucking project, and he also visited with Mr. Scharf (Tr. 833). Cameron Dale and Mr. Scharf knew each other many years previously (Tr. 832–33). Cameron Dale mentioned to Mr. Gilfenbain that there was an opening at Fresh World, Mr. Gilfenbain passed the information on to Mr. Scharf, and Mr. Scharf contacted Terry Allen of Fresh World, which resulted in his affiliation with Fresh World (Tr. 834–39). (This is the same Cameron Dale who interested Mr. Dixon in Fresh World.)

[(d) About three weeks after Mr. Scharf went to Fresh World, he began buying and selling produce for Fresh World (Tr. 852–56). He called people he had previously known through his prior employment. Pepe Fillgara of Central Produce was one of the first persons he called (Tr. 855–56, 863–64). Fresh World had not previously dealt with Central Produce (Tr. 856).

[Central Produce soon became Fresh World's largest customer. By December 1982, Central Produce received about 40% of all the produce sold by Fresh World (Tr. 895, 994). In 1983, Central Produce continued to receive about 40% of all the produce sold by Fresh World (Tr. 979–80, 994). Mr. Scharf made the majority of the sales to Central Produce, although Jeff Leonard made some (Tr.

752). (Central Produce's letter of January 18, 1984, referring to settlement discussions states that "Don Scharf" must be included in any settlement conversation "[s]ince it was he that we dealt with" (CX 14; Finding 40, *infra.*)

[Mr. Scharf told Mr. Dixon that Central Produce was a good receivable, and that based on previous experience, Central Produce had paid their bills (Tr. 160, 991–93).

[(e) Mr. Scharf is currently operating H & J Brokerage as a sole proprietorship, with a PACA license. He is not doing any business as a dealer, i.e., he does not take title to any produce. He operates solely as a broker. (Tr. 1016–17, 1024–25). He currently does brokerage business with Central Produce (Tr. 1017, 1024). Although he does not now operate as a dealer, Mr. Scharf would like to operate as a dealer if his license application is accepted (Tr. 1032).]

39. By July 31, 1983, Central Produce owed Fresh World an amount of $283,000.00, an increase from $42,000.00 which it owed in January, 1983. [By September 6, 1983, Central Produce owed Fresh World $342,144.66 (CX 12, 2d and 3d pages after cover page).] Mr. Dixon was aware of the large indebtedness owed by Central Produce at least by May, 1983, when it was brought to his attention by Security Pacific, which was lending on the account receivable. Although Mr. Dixon indicates that he told Mr. Scharf to cut back on the sales to Central Produce in June of 1983, this is contradicted by Mr. Scharf. It is reasonable to conclude, on the basis of the record as a whole, that both Mr. Scharf, and Mr. Dixon, as well as Judy, the bookkeeper, knew, could [have] known, or should have known, of the extent of the increasing indebtedness of Central Produce, at least from May, 1983.[3f] It was information readily ascertainable, and, certainly, material to the operation of the company.

40. Central Produce has offered to settle its indebtedness to Fresh World, for the amount of $118,000.00, thus conceding that it owes at least that amount. Fresh World claims that Central Produce owes approximately $340,000.00. David Dixon has refused to discuss this account with any representatives from Central Produce, and in fact, he has refused to communicate with the members of Central Produce. Why greater effort was not made to collect this account is not clear from the record, but it seems that very little effort was directed to collecting it. [However, David Dixon did

[f Central Produce's debt to Fresh World was some $116,000 on May 6; $218,000 on June 10; $153,000 on June 13; $231,000 on July 8; $281,000 on July 15; $329,000 on July 22; $362,000 on July 29; $283,000 on July 30; $327,000 on August 5; $332,000 on August 23; and $342,000 on September 6, 1983 (CX 12).]

take a number of steps to collect the Central Produce debt. He began by writing one or two letters to each debtor, including Central Produce, demanding payment (Tr. 407, 449). Security Pacific Bank then took charge of collecting the receivables, and Mr. Dixon met with them about six times to review their letters and phone calls to Central Produce and other creditors (Tr. 450, 478, 603–09; RX E). Mr. Dixon also had two telephone calls with Pedro Gonzales of Central Produce in January 1984 (Tr. 450–51). But he did not have Mr. Scharf on the line, as requested by Central Produce. Central Produce stated in a letter to Mr. Dixon (CX 14; see, also, RX E, 3d letter):

> We have offered on many occasions to discuss the matter, however, any discussion must be had with those people that handled the sales and purchases. You have promised to contact me on Friday, January 20th, 1984. At that time we can go over the entire matter, however, we will insist that your Mr. Don Scharf be included in the conversation. Since it was he that we dealt with and the fact that you have no first-hand knowledge of any of the surrounding events Mr. Scharf must necessarily be included.

solve the problems as they occurred, through discussions by telephone or Telex with Central Produce, suppliers, and other involved parties. He made some adjustments with Central Produce, and others were pending. (Tr. 897–98, 995–1005).]

41. As set forth herein, and on the basis of the record as a whole, the evidence does not support the allegation, or contention, that Mr. Scharf was solely responsible for the non-payment of the creditors of Fresh World, Inc. However, the evidence does disclose that such non-payment did occur at a time when he had significant responsibilities and duties with the company. For instance, he was the principal factor in the corporation commencing to sell to Central Produce—an account which it did not have prior to his coming into the corporation; Mr. Scharf did sign documents which bound Fresh World to Security Pacific Bank with respect to loans and other financial concerns; also, commencing the first part of January, 1983, Mr. Scharf was operating as the chief operating officer, and everyday manager, which included making all decisions regarding [his] purchase[s] and sale[s] of produce, . . . and generally overseeing the activities of other employees. It may have been that Mr. Scharf was [or would have been] powerless to go against the wishes of the corporate owners, as portrayed by either Mr. Allen, or Mr. Dixon [, in those instances where they chose (or could have chosen) to exercise their superior authority.] Mr. Scharf was motivated to keep his job and to show increasing business activity on the part of Fresh World, Inc. However, his close association with this corporation, which did not pay its bills, is sufficient reason for the Secretary to find that the Respondent applicant is unfit to receive a PACA license. His role with Fresh World was not that of an insignificant clerk or employee.

42. The day [after] Labor Day 1983, at a time when Mr. Scharf had traveled East with the knowledge and consent of Mr. Dixon who had advanced him funds to do so, Mr. Dixon closed down the office of Fresh World, Inc., gave termination notices to its employees, had four men come and take the records thereof, and had them removed to Mr. Dixon's warehouse, except for the accounts receivables which he personally took. During his travels East, Mr. Scharf had intended to go to Puerto Rico for the purpose of discussing collection on the amounts due from Central Produce, Inc. During the time Mr. Dixon was closing down the office, and while Mr. Dixon was there, Mr. Scharf called and wanted to speak to Mr. Leonard relative to some new accounts which Mr. Scharf had acquired. It was at that time that Mr. Scharf was advised by Mr. Dixon that he was no longer employed.

43. Although Mr. Dixon withdrew Mr. Scharf's signatory authority at the bank on August 6 [or 9], 1983, Mr. Scharf was unaware until August 19, 1983, that he no longer had authority to sign checks for Fresh World, Inc. His awareness came about August 19, 1983, when he wrote a check to himself [for expenses. He went to the Security Pacific Bank to cash the check, but the bank teller told him that his signature was not authorized (Tr. 793).[3h]

44. Mr. Scharf is untutored with respect to financial statements and he did not become acquainted with Fresh World's records except for the purchasing and payment aspects. There was maintained by him a tickler file which Mr. Scharf monitored to assure that payment to the vendors was made on time inasmuch as the sellers of produce had various times for payment, such as 10, 20, 30 or 35 days.

45. From March 1, 1983 through August 6 [or 9], 1983, when his authority to sign checks was removed, and, the first [part] of September, 1983, when he was dismissed as an employee, Mr. Scharf was employed to buy and sell produce, to manage the affairs of the corporation on a day-to-day basis including overseeing paying the bank, paying the personnel, paying the suppliers, and matters of like nature. Mr. Scharf was to report to Mr. Dixon on a monthly basis by way of financial statements. This was done through June or July, 1983. During this time period there were other employees of Fresh World, Inc. who were buying and selling produce including Mr. Schmidt and Mr. Leonard, each of whom handled his own account and was responsible for all aspects thereto.

46. *The evidence is undisputed that from and after August 6 [or 9], through September, 1983, Mr. Scharf did not have authority to sign checks and pay the bills.* However, he still had authority to buy and sell produce, and he did. A procedure was worked out whereby the bookkeeper was to make up the checks, give or send them to Mr. Dixon, who was supposed to either send them back to Fresh World's office for forwarding or was suppose[d] to sign the checks himself and put them in the mail. Utilizing this procedure, a number of the accounts for which the bookkeeper had written checks and sent to Mr. Dixon for signature and mailing never received the checks.

47. Mr. Scharf did not have control over the circumstances that caused the non-payment of the majority of the produce creditors

[3h Mr. Dixon testified that he told Mr. Scharf on August 5 or 6, 1983, that his name was removed as a person authorized to sign checks on Fresh World's account (Tr. 386-99), but the ALJ apparently did not believe the testimony, which was contradicted by Mr. Scharf (Tr. 793).]

listed in the Notice to Show Cause [, except to the extent that the Central Produce debt resulted in such nonpayments.] A vast majority of the 85 transactions set forth in Paragraph VI of the Notice to Show Cause became due and payable at a time subsequent to August 6, 1983.[4] There are a number of other accounts which became due at dates prior to August 6, 1983. Although some of these accounts were due in either June or July, 1983, they were of relatively small amounts and some of them may have been the subject of dispute. Using a 10-day payment due date [which is not entirely accurate (see note 4)], or as set forth in the Notice to Show Cause, amounts which would have been due and owing prior to August 6, 1983, were:

Transaction	1.	-	$3,257.10	
	2.	-	3,948.00	
	10.	-	1,016.20	
	19.	-	2,834.50	
	20.	-	2,834.50	
	21.	-	2,834.50	
	22.	-	2,834.50	
	23.	-	2,834.50	
	41.	-	3,656.70	
	44.	-	8,000.00	(August 3, 1983)
	45.	-	8,000.00	(August 3, 1983)
	46.	-	7,484.00	(August 4, 1983)
	47.	-	1,380.00	(August 5, 1983)
	49.	-	3,335.00	(August 5, 1983)

48. Between August 6, 1983, and August 19, 1983, Mr. Scharf signed a number of checks which were subsequently returned because he did not have signatory authority. It is not shown on the record whether any of the above transactions were among them or if any of such transactions were the subject of dispute. An example of a returned check is Exhibit 20 to Oneonta Trading Corp. and Respondent's Exhibit A for $1,900.00.

49. There can be no question that from August 6 [or 9], 1983, the only individual, according to the evidence in this case, to have authority to sign the checks and to give instructions as to how the payment procedure was to be done, was Mr. Dixon.

[4] These payment due dates set forth in the Notice to Show Cause may not coincide with the actual practice and payment procedures by Fresh World, Inc.; *for the purposes of this proceeding, the Complainant has not challenged the payment practices of Fresh World, Inc. wherein it paid its accounts at intervals ranging from 10 to 35 days.*

With respect to those accounts which fell due prior to August [illegible] 1983, (assuming that these are proper due dates), the responsibility for the non-payment thereof must be weighed in light of the evidence. Once Mr. Dixon went to the bank [5] and withdrew Mr. Scharf's signatory authority capabilities, although Mr. Scharf was not so informed and he continued to sign checks after that date for Fresh World, Inc., some of which were returned for lack of authority to sign the checks, Mr. Scharf could not have paid creditors if he had wanted to. Mr. Dixon's activities in Fresh World, Inc. at this time were of such magnitude that he had to be well aware of what was occurring financially; on the other hand, Mr. Scharf was not. He was under the impression that there was plenty of money to pay the creditors based on the volume of business which Mr. Dixon and other employees were generating. Accordingly, he never inquired about the availability of funds for payment to the suppliers. However, Fresh World's monthly financial statements (for which Mr. Scharf provided data (Tr. 456), looked at (Tr. 981–83), and discussed with Mr. Dixon (Tr. 170–78, 981–83)) show that the funds were largely coming from the $500,000 line of credit referred to in Findings 15–18, 25, 28–31, and 36. Specifically, Fresh World borrowed on the bank on the line of credit about $185,000 on April 30 and [illegible] (CX 8, p. 3; CX 9, p. 3), and about $357,000 on July 31, 1983 [illegible] p. 2). Moreover, prior to September 1983, Mr. Scharf signed the documents obtaining the loans from the bank which showed the total loan balance (e.g., CX 13, p. 1, line 19; Tr. 789–91, 960–61, [illegible]). For example, Mr. Scharf signed the loan document on [illegible] August 31, 1983, showing the loan balance of $366,398.87 (CX 13, p. [illegible] dated June 19).

3. The Complainant has taken the position by reason of the fact that Watermill, Inc. had as one of its customers, or as its only customer, Central Produce, Inc., a concern operating out of Puerto Rico, and because Central Produce became a customer of Fresh World, Inc. after the employment of Mr. Scharf, that this entitled the Complainant to bring into issue the alleged non-payment of suppliers by Watermill. This was not alleged in the Complaint and was not a matter upon which the Respondent was given notice prior to the hearing. Also, the Complainant cites no cases which entitled it, without notice, in a Notice to Show Cause proceeding, to determine the responsibility for non-payment of debts of another corporation on the sole basis that there was a common purchaser with Respondent. Moreover, the evidence sought to be adduced, and [illegible].

[5] This is indicative of Mr. Dixon's ownership authority and Mr. Scharf's non-au-

relied upon by Complainant, is not sufficient proof that Mr. Scharf was responsible for any violations by Watermill.

52. Robert Krupnick and his company, Watermill Export, Inc., were suspended from employment in the produce industry for failure to pay produce creditors. In this connection, agreement is reached with the contentions of the Respondent that the reason for failure to pay the produce creditors was not proven in this proceeding, and even if the Complainant's offer of proof had been admitted, it is insufficient to establish that such failure was caused by the customer, Central Produce, and/or the Respondent [or, rather, Mr. Scharf], who worked for Watermill as a buyer of produce.

53. At the oral hearing certain proferred evidence concerning the company "Watermill" was excluded because it was not alleged in the Notice to Show Cause as being a reason why a PACA license should be denied to Respondent. Moreover, Complainant's proof would not have shown facts which would have supported its conclusions drawn from "simple fact" and things being, "virtually inconceivable". It is upon this latter description that the Complainant relies for its statement that "It is virtually inconceivable that Mr. Scharf did not act as a seller of produce to [for] Watermill as well as a buyer from various customers". Reliability of this statement without proof cannot be granted. The evidence proferred herein is not sufficiently reflective of the financial picture of Watermill from which correct conclusions can be drawn.

54. The allegations of Paragraph 8 of the Complaint are most easily resolved. The evidence clearly shows that the records of Fresh World, Inc., were removed from the business premises by Mr. Dixon, or persons unknown. Respondent removed nothing. This is uncontroverted by the evidence. Therefore, paragraph 8 should be, and hereby is dismissed.

55. There has been a scarcity of evidence in this proceeding relative to numerous matters, such as who knew whom, and the relevance of such relationship, if any; and the financial status, according to generally accepted accounting practices, of Fresh World, Inc., at any given time.

56. The evidence in this case is insufficient to make a determination as to who were the owners of Central Produce.

57. The evidence is also insufficient in regard to transportation costs of the produce which was purchased for movement to Puerto Rico which obviously had to move over land, mostly by trucks, and picked up at a port of embarkation by a shipping and forwarding firm.

58. A disciplinary complaint was filed against Fresh World, Inc., on April 10, 1984, PACA Docket No. 2-6526, and a default Decision

issued thereon [finding that Fresh World "has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b)" (*In re Fresh World, Inc.*, 43 Agric. Dec. ____ (Oct. 4, 1984).]

59. Reparation awards have been granted by the Secretary of Agriculture to several of Fresh World, Inc.'s produce suppliers.

CONCLUSIONS

The granting or withholding of a license is a matter committed to the Secretary's expertise and discretion and is entitled to deference in the absence of violation of Constitutional, statutory, regulatory, or other legal mandates or restrictions.

By reason of the above findings of fact, it is concluded that:

a. Donald Scharf, a former employee, and, at least on paper, "President" of Fresh World, Inc. [at one time, and later "General Manager"], has engaged in practices of a character prohibited by the Act; and

b. Because Donald Scharf is president of and a holder of 75 percent of the outstanding stock of Respondent, H & J Brokerage, Inc., the Secretary of Agriculture may withhold the issuance of a license to Respondent.

Section 4(d) of the Act (7 U.S.C. 499d) reads in pertinent part:

> ". . . . If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, ... or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act the Secretary may refuse to issue a license to the applicant."

Section 2 of the Act (7 U.S.C. 499h) lists the practices prohibited under the Act:

> "It shall be unlawful in or in connection with any transaction in interstate or foreign commerce
>
> * * * * * * *
>
> (4) For any commission merchant, dealer, or broker to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had;"

The Act provides the framework by which the Secretary of Agriculture can regulate business practices in the perishable agricultural commodities industry. Essential to that regulation is the procedure outlined in Section 4(d) whereby the Secretary may question the fitness of any particular applicant for a license to conduct business in the perishable agricultural commodities industry. In the case of a corporate applicant, the inquiry into fitness extends not only to the corporate entity itself, but also to the principals of the corporation; specifically extending to an officer, director, or holder of more than 10 percent of the outstanding stock of the corporation. The inclusion of this level of inquiry into fitness, of course, recognizes that corporate activity is initiated by those persons who control the corporation.

Similarly, section 4(d) of the Act authorizes the Secretary to withhold the issuance of a license when a person who is responsibly connected with the applicant has engaged in practices of the nature prohibited by the Act. Hence, if there is evidence that a person responsibly connected with the applicant has engaged in a prior course of conduct which included practices of the nature prohibited by the Act, then that person should be restrained in his methods of doing business in the perishable agricultural commodities industry in order to protect those members of the industry who can and do conduct their business in accordance with the dictates of the Act. Donald Scharf was President for a time, as well as a responsible employee of Fresh World, Inc. and because Fresh World, Inc. did not, and has not, paid, truly and fully its creditors, such non-compliance with the Act renders the applicant unfit to engage in the business of dealing in perishable agricultural commodities in interstate or foreign commerce as a commission merchant, dealer, or broker.

As stated more fully in the Findings of Fact, Fresh World, Inc. engaged in practices of a nature prohibited by the Act. Fresh World, Inc. was a licensee under the Act, and violated section 2(4) of the Act by failing to account truly and correctly and make full payment promptly to the sellers of produce.

Under section 4(d), the Respondent-applicant is given the opportunity to "show cause why the license should not be refused". If the applicant fails to present sufficient evidence to prove its fitness to hold a license, then the Secretary is justified in refusing the issuance of the license. Complainant has established that Fresh World, Inc., with which Mr. Scharf was responsibly connected [, i.e., connected in a responsible manner with the violations], has engaged in a practice of a character prohibited by the Act.

The extent of responsibility for the non-payment of Fresh World's creditors is not exclusively with Mr. Scharf, as can be seen by the activity and withdrawals of corporate funds by others associated with the corporation. Even assuming that Mr. Scharf's remuneration was as stated by the Complainant, there is no showing that this was excessive when viewed in light of the business he generated, and the activities he engaged in. No case has been brought to my attention where a future applicant is denied a license because of a nonadjudicated determination of "responsibly connected." Complainant avoids this by making the "knowing" or the "permitting" of unpaid accounts by the Central Produce account as a basis for the denial of a license. However, as a result of the evidence adduced in this proceeding, it is more than evident that Mr. Scharf actively participated in the corporate affairs of Fresh World, Inc., even though he may not have been responsible for all of its activities.

This is a very close case as to who was responsible for the non-payment of creditors, but Mr. Scharf was associated and closely involved with the operations of Fresh World, from June, 1983, through August 6 [or 9], 1983, when he could no longer sign checks, and until September, 1983, when he was dismissed as an employee. The documentation is not sufficiently complete to determine whether or not, if all the accounts receivables had been collected, and if withdrawals from the corporation had not occurred, the creditors could, or would, have been paid in full [, but I infer that they would have been fully paid]. However, all things considered, and from an evaluation of the entire record evidence, I find and conclude that the Secretary had sufficient and reasonable basis for refusing a license to the Respondent. Accordingly, I find that the evidence establishes that, as that term is used in the Act, Respondent is "unfit" to receive a PACA license.

By reason of the occurrences set forth in the above stated Findings of Fact, the financial status of Fresh World, Inc., from October, 1981, through September, 1983, was affected by the following transactions:

1) Although Mr. Faulkner was running the business on a day-to-day basis, others of the original incorporators may have been receiving consulting fees. There is evidence that Mr. Cameron Dale had a "consulting agreement" which was not reduced to writing and any amounts which may have been paid thereunder are not evident on the record.

2) Karl Allen caused to be withdrawn from the corporation an amount of $40,000.00 and still retained his 25%

> ownership, which he subsequently tried to sell for $50,000.00. The original 75 shares of stock belonging to others than Karl Allen apparently were never surrendered to the corporation, and later became the object of purchase [or, rather, acquisition] by Mr. Dixon.

Also, without corporate books and records, such as audited profit and loss statements and balance sheets, normally maintained, it cannot be ascertained from this record what occurred, as it might affect the corporate structure when Mr. Faulkner left the business. Supposedly, he would have transferred his stock back to the corporation. Whether there was any consideration, other than a release from liability by the bank is not known.

Therefore, at the conclusion of the first 14 or 15 months of its existence, an amount coinciding with the entire capitalization of Fresh World, Inc., had been depleted. Mr. Scharf first became associated with the corporation as a consultant the latter part of June, 1982, and three months later, became a regular employee. During December, 1982, or January, 1983, Mr. Karl Allen withdrew the amount of $25,000.00 from the corporation, which is a part of the $40,000.00 mentioned above. There is no evidence that Mr. Scharf knew, or had any control over this withdrawal. The check was signed by Terry Allen, Mr. Karl Allen's brother.

Mr. Dixon indicated that the initial $70,000.00 which he utilized to [loan to] Fresh World, Inc. consisted of corporate funds from Food Source, Inc. for which Food Source, Inc. issued a check for $50,000.00 in January, 1983, and another check for $20,000.00 in February, 1983. Food Source, Inc. acquired no promissory notes for the transfer of the $70,000.00 from Food Source, Inc. to Fresh World. Food Source's books did not reflect either a separate loan to Fresh World nor did it carry Fresh World's stock in its capital asset account. With respect to this transaction, its books showed nothing. The implications of this are not explored herein and although Mr. Dixon was 100 percent owner of Food Source, Inc., according to the testimony of Karl Allen, he was only a 75% owner of Fresh World, Inc.

Mr. Dixon's own testimony indicates that the initial $70,000.00 advanced for the [loan to] Fresh World from Food Source was repaid over a period of months and his testimony reflects that by the end of July, 1983, the initial advance had been repaid.

In addition, as set forth herein, Mr. Dixon withdrew $120,000.00 from the corporation, Fresh World, Inc., at a time when it had unpaid creditors. According to Mr. Dixon's testimony, in August, 1983, he caused the disbursement of corporate funds from Fresh World in the total amount of $120,000.00; $20,000.00 of which he al-

located to himself to cover the cost of management and wrote four checks to Food Tech Corp. for $100,000.00 [, to be held to settle with the Security Pacific Bank on the line of credit (Tr. 234–35, 490–91)]. Food Tech was not the guarantor of Fresh World at the bank; Food Source and Mr. Dixon were.

The above mentioned facts take on significance, because the Complainant would have us believe that the creditors of Fresh World Inc., were not paid solely because of what Mr. Scharf did or did not do. Such an approach ignores the amounts withdrawn from the corporation by its owners.

The findings and conclusions herein have been premised upon a consideration of the entire record evidence, including an evaluation of the credibility of witnesses. However, there is a paucity of reliable evidence as to the corporate structure and activities of a number of corporate entities referred to, including Central Produce; North American Produce Distributors; and Luallipam.

Notwithstanding the various assertions of the parties, I find the evidence inconclusive and not sufficient to furnish a basis for determining who owned and controlled Central Produce. Ownership and control can be proven in many competent ways, including a copy of the corporate charter, minutes, financial statements, etc. This was not done.

From the evidence presented, an unresolved question in this case, and one upon which there is little credible evidence, is that of why greater effort was not made by the owners to effectuate payment from Central Produce. The dramatic increase in indebtedness from $42,000.00 to over $300,000.00 was not unknown, and although there is some evidence that a few statements were made to Mr. Scharf concerning the same, apparently greater effort was not expended. At the time that the Bank removed this account from its security portfolio, this indeed was an indication of the potential peril which this overdue account presented to Fresh World.

For whatever reasons, and the reasons are not clear on the record, the outstanding balance of Central Produce was allowed to increase to over $300,000.00 as of September, 1983, from approximately $97,000.00 in March, 1983, with, at best, only half-hearted attempts by the principals of Fresh World to collect the balance due, and some such attempts were made after September 6, 1983. However, the record does show that approximately $50,000.00 on account was received from Central Produce on or about August, 1983. There is also evidence of record that employees of the Bank considered the Central Produce account receivable as "good" and

could be collected—"They are a strong company."—and that credit reports so indicated [(Tr. 766-67).[5a]]

On Brief, Complainant continues to advance its "very determined position" that an employee of Security Pacific was incompetent to give testimony relating to the status and security aspects concerning an account, and the collection of same, over which the Bank had assigned him. The Complainant's many objections were overruled at the time of the oral hearing, and I believe rightly so. Fresh World had a substantial line of credit from the Bank, and, as security therefor, the Bank had taken the accounts receivable of the Company, which included the account of Central Produce, which constituted a substantial portion of the accounts receivable until it was removed as an ineligible account. At issue here is why the creditors of Fresh World were not paid—and if that was the fault of Mr. Scharf, to such a degree that he should be denied a license. Certainly, details concerning the servicing, status, and collection efforts of the Bank are relevant and material to this case.

If Complainant believes Mr. Red's testimony to be incorrect, it could have so shown by competent evidence. Complainant recognizes the importance of the Central Produce account to the nonpayment of the produce creditors—" * * * the whole difficulty was that the Central Produce account had not paid $342,000. * * *". This was of no less importance to the Bank which eventually removed Central Produce from the eligible security. To take a position that Mr. Red, a banking official, with assigned duties over this account, "* * * was not connected with, nor interested in, the payment of the amount due and owing [from] Central Produce and [to] Fresh World * * *" is unrealistic, as the Bank anticipated and intended to be paid, even if it had to resort to legal action.

The evidence was received not for the purpose of showing that Mr. Red knew "* * * exactly what was happening between Central Produce Corporation and Mr. Dixon on behalf of Fresh World", but rather, *for the purpose of showing what information the Bank had* with respect to the accounts receivable, which were the Bank's security.

Complainant's position, more clearly set forth in its Reply Brief, emphasizes that it does not assert, nor does it maintain that there

[5a The bank testimony, should, however, be evaluated in the light of the fact that Mr. Dixon had previously testified (Tr. 489):

> A. We plan to assert a claim against Security Pacific Bank on behalf of the corporation that they were negligent in granting the credit against the receivables in the first place and in effect induced myself, Food Source and Fresh World, Inc. to borrow those funds when to do so was not prudent.]

was a conspiracy between Mr. Donald Scharf and other persons to deprive produce creditors of money that is due them.

Complainant's allegation is that Mr. Scharf knew of the problems of dealing with Central Produce Company in Puerto Rico because of prior associations with persons and a corporation which had dealt with Central Produce.

The allegation of the Complaint is to the effect that during the relevant period Donald Scharf:

> "* * * sold to Central Produce Corp., San Juan, Puerto Rico, substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp., to Fresh World, Inc., of more than $300,000.00 to accrue. * * *"

The above mentioned allegation of the Complaint goes beyond the subsequent position of Complainant on brief, i.e., the difference between "permitting an indebtedness" and "(knowing) of the problems of dealing with Central Produce Company".

The principles set forth in the case cited by the Complainant, namely, *In Re: Ludwig Casca*, 34 A.D. 1917 (1975), are applicable herein. The denial of a license is not to be regarded as a penalty imposed on the applicant, but rather a means whereby the Secretary protects the public interest. If the corporate respondent herein were to be granted a license, the public will be dependent upon Mr. Scharf to fulfill the responsibilities under the Act, albeit through a corporation. Under the terms of the Act, the Secretary *may* withhold the issuance of a license under circumstances where he finds that the applicant is unfit to engage in business as a licensee. To adopt the Respondent's view would be to accept the proposition that Mr. Scharf had absolutely nothing to do with the non-payment of creditors, and, the financial difficulties of the corporation, Fresh World. As I noted above, I do not believe that Mr. Scharf was solely to blame for the non-payment of creditors, but he indeed was more than nominally involved in the business transactions of Fresh World. Although the determination of who is responsibly connected with a corporation is subject to an administrative hearing and decision, this does not preclude an examination of the circumstances in this Notice to Show Cause proceeding as to the correctness of the Secretary's determination that the corporate applicant is unfit to be licensed under the Act.

The goal of the Perishable Agricultural Commodities Act is that only financially responsible persons should be employed in the business subject to the Act.

The concept that the corporation is a distinct entity, even when wholly owned by a single individual, is designed to serve normal, inoffensive uses of the corporate device and is not to be stretched beyond its reason and policy. The Respondent's reliance on *Quinn* vs *Butz*, 510 F2d 743 (C.A.D.C., 1975) does not preclude the result in this case. Mr. Scharf's officership [and, later, service as General Manager] was not purely nominal, and he did participate on an extensive basis in the management, on a day-to-day basis, of the business activities of Fresh World. Thus, this is a different situation than was present in such cases as *Minotto* vs *U.S.D.A.*, 711 F2d 406 C.A.D.C., 1983) where the Court in reversing a "responsibly connected" determination found that the petitioner therein was a "nominal" director to whom knowledge of the violations could not be imputed—essentially, the litigant therein was a clerical employee.

Mr. Scharf's association with Fresh World was not a passive one—as he indicated with respect to Exhibit C, although he did not have the responsibility of filling the form out (Miss Allwardt did), "The responsibility that I had was that my signature had to be affixed to the bottom of the sheet in order for the bank to accept it." (Tr. 790). This is reflective of executive responsibility—it would be unusual for corporate officers of a large business concern to personally sit down and compile the figures, reports, etc. This is usually done by clerical help and others.

He also signed a Security Pacific Note, and had a signature authorization and corporate resolution to obtain credit.

Even if Mr. Scharf was under the ultimate control of Mr. Dixon, the total circumstances of this case are such that he can not be absolved from the consequences of non-payment to the creditors of Fresh World, Inc., for produce which they supplied.

As set forth herein above, a disciplinary Complaint was filed against Fresh World, Inc. on April 10, 1984, by the Secretary, in PACA Docket No. 2-6526. By reason of official notice thereof, it is ascertained that no answer was filed thereto, and that the allegations of the Complaint contained assertions that during the period June, 1983, through September, 1983, Fresh World, Inc. violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce. By reason of the admission of such facts by failing to file an answer thereto, a default decision was issued on October 4, 1984, which became final on November 16, 1984.

The officers and stockholders [and General Manager] of Fresh World, Inc., engaged in practices of the character prohibited by the PACA, and the Respondent/Applicant is unfit, as that term is used in the Act, to be licensed under the PACA. If this is a harsh result, then too, are the undeniable facts that, even as late as the oral hearing, there remained unpaid numerous produce suppliers who had furnished produce with the expectation of being paid. They were not.

An evaluation of the record as a whole establishes that the Secretary did not act illegally in denying the applicant a license under the Perishable Agricultural Commodities Act. The many and varied contentions of the parties have been carefully considered. Any motions, requests, or otherwise which have not been ruled upon, and which are inconsistent with this Decision, are hereby denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent argues (correctly) on appeal that Mr. Scharf was not "responsibly connected" (as defined in the Act) with Fresh World during the period that Fresh World failed to pay for produce. The term "responsibly connected" is defined as follows (7 U.S.C. § 499a(9)):

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . .

However, the Secretary's authority to refuse a license to respondent arises under § 4(d) of the Act (7 U.S.C. § 499d(d)), quoted in the Preliminary Statement (*supra* pp. 5-6). That section does not use the term "responsibly connected." Under § 4(d) of the Act, the Secretary may refuse to issue a license to an applicant that is "unfit . . . because . . . any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this [Act]" (7 U.S.C. § 499d(d)). Since Mr. Scharf is admittedly president and treasurer and a 75% stockholder of the applicant, the Secretary may refuse to issue a license to respondent if it is unfit because Mr. Scharf "engaged in any practice of the character prohibited by [the Act]."

Although the "responsibly connected" definition in the Act and the cases cited by respondent construing the term "responsibly connected" are irrelevant in this case, it is worth mentioning briefly

(for the benefit of a reviewing court) under what circumstances a "responsibly connected" determination is relevant. Section 8(b) of the Act provides (7 U.S.C. § 499h(b)):

> (b) *Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties*
>
> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—
>
> (1) whose license has been revoked or is currently suspended by order of the Secretary;
>
> (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
>
> (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.
>
> The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Scretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a

> reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

Under § 8(b) of the Act, just quoted, since Mr. Dixon was "responsibly connected" with Fresh World, which was found to have committed flagrant and repeated violations of 7 U.S.C. § 499b (Finding 58), no licensee could employ Mr. Dixon without the approval of the Secretary, and such approval could not be given until one year after the issuance of the Fresh World decision, and then only if the licensee furnished a satisfactory bond. After 2 years, the Secretary could approve Mr. Dixon's employment without a bond.

The term "responsibly connected" is also used in granting the Secretary authority to refuse a license under conditions not relevant here. Specifically, § 4(b) of the Act, not involved here, provides (7 U.S.C. § 499d(b)):

> (b) *Refusal of license; grounds*
>
> The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is a person who, or is or was responsibly connected with a person who—
>
> (A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;
>
> (B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;
>
> (C) within two years prior to the date of the application, has been found guilty in a Federal court of having violated the provisions of sections 491, 493 to 497 of this title, relating to the prevention of destruction and dumping of farm produce; or

> (D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 499g(c) of this title, to pay any reparation order issued against him within two years prior to the date of the application.

The inclusion of the "responsibly connected" criterion in § 4(b) of the licensing section of the Act, just quoted, while omitting the term in § 4(d) of the licensing section of the Act (which is applicable here), emphasizes that the "responsibly connected" criterion should not be implied in the place at which it was omitted. *Lang* v. *Comm'r of Internal Revenue,* 289 U.S. 109, 112 (1933); *Corn Prods. Ref. Co* v. *Benson,* 232 F.2d 554, 562 (2d Cir. 1956). Hence the fact that Mr. Scharf was not "responsibly connected" with Fresh World within the meaning of the Act is irrelevant.

The issue here is whether Mr. Scharf "engaged in any practice of the character prohibited by [the Act]" while he was General Manager of Fresh World (7 U.S.C. § 499d(d)). In order to make that determination, it is necessary to know what type of payment practices are prohibited by the Act, so that we can determine whether Mr. Scharf engaged in practices of that "character".

The Act has been interpreted in a very tough and harsh manner, with the overwhelming support and approval of the industry.[6] See, *e.g., In re B.G. Sales Co.,* 44 Agric. Dec. ____ (Oct. 9, 1985), attached as an Appendix to this decision. A licensee which fails to pay for produce has its license revoked, irrespective of excuses (or if it has no license, a finding is made that it engaged in repeated or flagrant violations of the Act, which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation),[7] since "the Act calls for payment—not excuses." [8] In fact, if the pleadings or bankruptcy papers of which of-

[6] As stated in H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2:

> The law has fostered an admirable degree of dependability and fairness in this industry. . . . In spite of the strictness of some of the provisions of the law, the act and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support.

[7] *In re V.P.C., Inc.,* 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.,* 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.,* 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.,* 34 Agric. Dec. 700, 750-51 (1975), *aff'd,* 549 F.2d 830 (D.C. Cir.), *cert. denied,* 434 U.S. 920 (1977).

[8] *In re B.G. Sales Co.,* 44 Agric. Dec. ____ (Oct. 9, 1985) (non-payment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.,* 42

Continued

ficial notice is taken show that a licensee has failed to pay for an amount of produce that is not *de minimis* (and there is no dispute as to whether payment was due), the licensee is not even afforded an opportunity for a hearing to give excuses as to why payment was not made.[9]

Agric. Dec. ____ (Oct. 6, 1983) (non-payment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (non-payment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (non-payment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (non-payment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (non-payment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (non-payment because of bankruptcy of another firm owing respondent $776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (non-payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (non-payment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (non-payment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (non-payment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafesak*, 39 Agric. Dec. 683, 685-86 (1980) (non-payment because of strike and failure of others to pay respondent), *aff'd* (unpublished), 673 F.2d 1329 (6th Cir. 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (non-payment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (non-payment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (non-payment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (non-payment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over $130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (non-payment because of financial difficulties).

[9] *E.g., In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. ____ (Apr. 8, 1986); *In re Top Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. ____ (Jan. 27, 1986); *In*

Continued

As in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored in determining violations or sanctions under the Perishable Agricultural Commodities Act since "the Act calls for payment—not excuses.[10]

In affirming the Department's refusal to consider mitigating circumstances in failure to pay cases under the Perishable Agricultural Commodities Act, the court held in *Finer Foods Sales Co.* v. *Block*, 708 F.2d 774, 781–82 (D.C. Cir. 1983):

> The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment—not excuses.' " *Quoting In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980). See also *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).
>
> The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S.Rep. No. 2507, 84th Cong., 2d Sess. (*citing* H.Rep. No. 1196, 84th Cong., 1st Sess.), *reprinted in*

re B.G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. ____ (Oct. 7, 1985); *In re Veg-Mix, Inc.*, 44 Agric. Dec. ____ (Aug. 21, 1985), *appeal docketed*, No. 85-1771 (D.C. Cir. Nov. 22, 1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. ____ (Aug. 21, 1985), *appeal docketed*, No. 85-1590 (D.C. Cir. Sept. 19, 1985).

[10] *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (delayed payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1139-40 (1981); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167-68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons.*, 34 Agric. Dec. 120, 130-31 (delayed payment because of uncollectable accounts), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

1956 U.S. Code Cong. & Ad.News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

> Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.
>
> *Quoting In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 720 (1978).
>
> In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick* v. *Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) *quoted in Marvin Tragash Co.* v. *United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).
>
> The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

As shown in the cases cited in note 8, *supra*, the excuse frequently made by a licensee which fails to pay for produce is that another firm failed to pay the licensee. But that excuse has always been rejected. As stated in *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158 (1983):

> Respondent contends that its violations were caused by the failure of Eicaar Export Company, Inc., to pay respondent $248,805.66. Notwithstanding respondent's many efforts to assure itself that Eicaar's ever increasing indebtedness would be paid in full, any seller extending credit on such a large scale to a single firm is taking a calculated risk, at the expense of the seller's suppliers, if the seller is unable to withstand a loss equal to the single firm's indebtedness.

In the present case, Mr. Scharf engaged in practices that led to the failure of Fresh World to pay for at least a large part of the produce involved in Fresh World's payment violations, albeit Mr. Scharf was not the only person connected with Fresh World who engaged in such practices. Mr. Scharf was General Manager of Fresh World (Finding 25). He selected Central Produce as a customer for Fresh World (Findings 38, 38(a)-(d)). He is the one who sold the great bulk of the produce to Central Produce (Findings 38, 38(a)-(d)). He was aware of the tremendous increase in Central Produce's debt to Fresh World while it was happening, i.e., while it was increasing from $42,000 to $342,000 (Findings 38, 39). He knew that Watermill sold only to Central Produce, and that Watermill went broke, but he made no effort to inquire as to whether Watermill went broke because Central Produce failed to pay for merchandise (Finding 38(b)).[11]

Although the record does not show whether Central Produce, which offered to settle the $342,000 debt for $118,000, was entitled to legitimate adjustments with respect to the produce (see Finding 40), in any event Mr. Scharf personally made at least the great bulk of those sales that proved catastrophic to Fresh World.

Respondent argues that Mr. Dixon was solely responsible for Fresh World's failure to pay suppliers, and respondent goes so far as to argue that Mr. Dixon planned from the beginning to withdraw from Fresh World and misappropriate its funds. However, the record does not support respondent's contention. I infer from the totality of the factual situation that Mr. Dixon took over Fresh World in good faith, risking $500,000 of his own money and that of his corporation (Food Source, Inc.) in providing needed capital for Fresh World (Finding 16), and that he took measures to protect his own interests (at the expense of suppliers) in the summer of 1983 only because the profits predicted by Mr. Scharf did not develop, and he was concerned about his large financial exposure and the tremendous debt owed by Central Produce.

Moreover, even though Mr. Dixon took protective measures (to himself) at the expense of suppliers, if the $342,000 had been available from Central Produce, Fresh World's suppliers could have been paid. Accordingly, Mr. Scharf's practices (which led to most, if not all, of the $342,000 Central Produce debt) caused suppliers not to be paid for their produce.

[11] Whether Watermill's failure was caused by Central Produce is not vital to complainant's case. In fact, the record does not explore the reasons for Watermill's financial failure. But a prudent salesman would at least have inquired as to whether Watermill's financial failure was caused by Central Produce's failure to pay Watermill.

The facts here are analogous to those in *In re Golden West Wholesale Fruit Distributors, Inc.*, 36 Agric. Dec. 1591 (1977), in which Golden West's license application was denied because Paul Gitmed, president and 50% stockholder of Golden West, had previously engaged in practices of a character prohibited by the Act when he was an employee of C&M Citrus Distributors, Inc. (C&M). Paul Gitmed was not "responsibly connected" with C&M, within the meaning of the statutory definition, but he was the employee who actually managed C&M's fruit department, and he prepared false entries on slips of paper that were utilized by the bookkeeper to pay consignors. In *Golden West* it is stated (36 Agric. Dec. at 1595-97, 1599):

> Respondent argued at the hearing and in its brief that Section 4(d) grants authority to withhold a license pending a hearing only if Paul Gitmed was "responsibly connected" with C&M. Because Paul Gitmed was not "responsibly connected" with C&M at the time violations occurred, respondent argues that a license cannot be denied.
>
> However, we see no merit in this argument, since Section 4(d) simply provides that a license may be withheld if the applicant (here respondent, Golden West) or one (Paul Gitmed) responsibly connected with the applicant (not some other licensee such as C&M) has engaged in any practice of the character prohibited by the Act.
>
> The issue of responsible connection has bearing only on the question of whether the person who committed the unlawful practices was responsibly connected with the applicant (Golden West in this case). By respondent's own admission, Paul Gitmed is the president and 50 percent shareholder of the respondent-applicant. As can be seen from the express language of section 4(d), there is no requirement that a person who has engaged in practices of the nature prohibited by the Act be responsibly connected with the business entity which is formally charged with the violations.
>
> The Act provides the framework by which the Secretary of Agriculture can regulate business practices in the perishable agricultural commodities industry. Essential to that regulation is the procedure outlined in section 4(d) whereby the Secretary may question the fitness of any particular applicant for a license to conduct business in the perishable agricultural commodities industry. In the

case of a corporate applicant, the inquiry into fitness extends not only to the corporate entity itself, but also to the principals of the corporation; specifically extending to an officer, director, or holder of more than 10 percent of the outstanding stock of the corporation. The inclusion of this level of inquiry into fitness, of course, recognizes that corporate activity is initiated by those persons who control the corporation.

Similarly, section 4(d) of the Act authorizes the Secretary to withhold the issuance of a license when a person who is responsibly connected with the applicant has engaged in practices of the nature prohibited by the Act. Hence if there is evidence that a person responsibly connected with the applicant has engaged in a prior course of conduct which included practices of the nature prohibited by the Act, then that person should be restrained in his methods of doing business in the perishable agricultural commodities industry in order to protect those members of the industry who can and do conduct their business in accordance with the dictates of the Act. Paul Gitmed as president and 50 percent shareholder of Golden West renders the applicant unfit to engage in the business of dealing in perishable agricultural commodities in interstate or foreign commerce as a commission merchant, dealer, or broker.

As stated more fully in the findings of fact, Paul Gitmed engaged in practices of a nature prohibited by the Act. From January 1973 through September 1974, C&M, a licensee under the Act, violated section 2(4) of the Act by failing to account truly and correctly and make full payment promptly of the net proceeds derived from the sale of deciduous fruits handled on consignment. During the time in which at least 117 of those violations occurred, Paul Gitmed operated the deciduous fruit department of C&M. . . .

* * * * * * *

Respondent's argument that Paul Gitmed could not have violated the Act while working for C&M, since C&M committed the violations, is irrelevant since Golden West's application for a license may be refused if it is "unfit" because "any officer or holder of more than 10 per centum of

> the stock * * * engaged in any practice of the character prohibited by this chapter" (7 U.S.C. 499d(d)). It is not necessary to find that Paul Gitmed, who is president of Golden West and holds 50% of its stock, violated the Act previously—only that he engaged in a practice *of the character* prohibited by the Act. That he clearly did.

Here, as in *Golden West*, Mr. Scharf did not previously violate the Act. Fresh World did. However, as General Manager of Fresh World, he engaged in practices that were a primary cause of Fresh World's violations. Hence respondent is unfit to engage in business as a licensee because of Mr. Scharf's association with respondent.

Respondent contends that the ALJ applied an erroneous standard of proof (pp. 42-43, *supra*). However, once complainant established that Mr. Scharf engaged in a practice of the character prohibited by the Act, the burden of proof was on respondent to show that it is, nonetheless, fit to receive a license. The Act states that if "after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to *show cause why the license should not be refused*" (7 U.S.C. 499d(d), emphasis added). The Act does not state that the hearing is to show cause why the license should not be *issued*. Under the wording of the Act, respondent is the proponent of an order that the "license should not be refused." Accordingly, respondent has the burden of proving "why the license should not be refused." See 5 U.S.C. § 556(d). As stated in *In re Golden West Wholesale Fruit Distributors, Inc.*, 36 Agric. Dec. 1591, 1598 (1977):

4. Donald Scharf was president and/or general manager, and/or a director of Fresh World, Inc., . . . during the period June 1982 through September 1983. . . .

* * * * * * *

6. During the period June 1983 through September 1983, Fresh World, Inc., violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce. The details of these transactions are set forth below:

* * * * * * *

The total amount past due and unpaid these 20 sellers is $331,194.55.

7. On information and belief, during the period June 1983 through September 1983, Donald Scharf, acting as general manager, made all decisions regarding from whom Fresh World, Inc., would purchase and to whom it would sell perishable agricultural commodities. Until August 9, 1983, Donald Scharf had authority to issue checks for Fresh World, Inc. During the above period, Donald Scharf sold to Central Produce Corp., San Juan, Puerto Rico substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp., to Fresh World, Inc., of more than $300,000 to accrue. Central Produce has failed and refused to pay this indebtedness.

* * * * * * *

10. Donald Scharf, as president, director and/or general manager of Fresh World, Inc., during the period in which the violations of the PACA alleged in paragraphs 6 and 8 above occurred, is responsible for the commission of these violations. These acts constitute practices of the character prohibited by the PACA.

The Notice to Show Cause sets forth precisely complainant's contentions involved here. But even if the allegations had not been precisely stated, it is well settled that the formalities and technicalities of court pleading are not applicable in administrative pro-

ceedings.[12] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.[13]

In addition, complainant's attorney made his position plain throughout the hearing, e.g., he stated (Tr. 370; and see Tr. 610–11):

> The issue is whether Mr. Scharf engaged in practices of the contract [character] prohibited by the act. The practices with which we are concerned are the purchases of commodities for [from] produce sellers which were not paid for by Fresh World.
>
> And we respectfully suggest that we are laying responsibility on Mr. Scharf for those kinds of actions. . . .

Furthermore, complainant rested on February 10, 1984, and most of respondent's case was not put on until April 4 and 5, 1984. In a hearing conducted at intervals, there is little or no basis for a complaint as to the adequacy of the administrative allegations instituting the procedure.[14]

For the foregoing reasons, the following order should be issued.[15]

[12] *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142–44 (1940).

[13] *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350–51 (1938); *Aloha Airlines, Inc.* v. *CAB*, 598 F.2d 250, 261–62 (D.C. Cir. 1979); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co.* v. *United States*, 393 F.2d 247, 252–53 (7th Cir. 1968); *Cella* v. *United States*, 208 F.2d 783, 788–89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Pub. Ass'n* v. *NLRB*, 193 F.2d 782, 799–800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union* v. *NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co.* v. *FTC*, 142 F.2d 511, 518–19 (6th Cir. 1944); *A.E. Staley Mfg. Co.* v. *FTC*, 135 F.2d 453, 454–55 (7th Cir. 1943); *NLRB* v. *Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug 11, 1980); *In re Holcomb*, 35 Agric. Dec. 1165, 1173–74 (1976).

[14] *Locomotive Finished Material Co.* v. *NLRB*, 142 F.2d 802, 804–05 (10th Cir. 1944); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

[15] It would be helpful in future cases if the ALJ would require the parties to number the pages of multi-page exhibits.

ORDER

The respondent's, H & J Brokerage, Inc.'s, application for a license under the Perishable Agricultural Commodities Act is denied.

Copies hereof shall be served upon the parties.

APPENDIX

In re B.G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985).

[Excerpt omitted.—Ed.]

In re: EMERSON ELLIOTT PRODUCE, PACA Docket No. 2-6970. Decided April 21, 1986.

Failure to make prompt payment—License revoked.

Edward M. Silverstein, for complainant.
Raymond Rotella, Orlando, FL, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 3, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May through October 1984, respondent purchased, received and accepted, in interstate and foreign commerce, from 16 sellers, 41 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $221,886.84.

A copy of the complaint was served upon respondent which filed an answer thereto admitting all of the material allegations of the complaint with one minor exception.[1] In view of this, and upon complainant's motion, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

[1] Respondent denies being indebted to Growers Packing Company, Florida City, Florida, in the amount of $22,773.80 for four lots of tomatoes. In its motion for a decision, complainant has withdrawn this allegation.

FINDINGS OF FACT

1. Respondent, Emerson H. Elliott, is an individual doing business as Emerson Elliott Produce, whose mailing address is P.O. Box 745, Casselberry, Florida 32707.

2. Pursuant to the licensing provisions of the Act, license number 801217 was issued to respondent on June 24, 1980. This license was renewed annually, and was next subject to renewal on or before June 24, 1986. However, respondent's license was automatically suspended on February 27, 1985, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d) when he failed to satisfy a reparation award issued against him in PACA Docket No. 2-6699 (44 Agric. Dec. ____).

3. As more fully set forth in paragraph 5 of the complaint, during the period June through October 1984 respondent purchased, received and accepted in interstate and foreign commerce, from 15 sellers, 37 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $199,113.04.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 37 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b). *Zwick* v. *Freeman*, 373 F.2d 110 (2d Cir.), *cert. den.*, 389 U.S. 835 (1967); *George Steinberg and Son, Inc.* v. *Butz*, 491 F.2d 988 (2d Cir.), *cert. den.*, 419 U.S. 830 (1974); *Marvin Tragash Co.* v. *United States Dept. of Agr.*, 524 F.2d 1255 (5th Cir. 1975); *United Fruit & Veg. Co.* v. *Dir. of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir.), *cert. den.*, 456 U.S. 1007 (1982); *Wayne Cusimano, Inc.* v. *Block*, 692 F.2d 1025 (5th Cir. 1982); *Finer Foods Sales Co., Inc.* v. *Block*, 708 F.2d 774 (D.C. Cir. 1983); and *Melvin Beene Produce* v. *Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). Accordingly the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after

service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[Decision and Order became final on May 29, 1986.—Ed.]

In re: GULFPORT TOMATOES, INC., PACA Docket No. 2-7085. Decided June 12, 1986.

Failure to pay—repeated—publish.

Ben E. Bruner, for complainant.
William D. Bethea, Gulfport, MS, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.;* hereinafter referred to as the "Act"), instituted by a complaint filed on February 6, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period April 1984 through April 1985, Respondent failed to make full payment promptly to nine sellers, of the agreed purchase prices, or balances thereof, in the total amount of $165,635.43 for 52 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Gulfport Tomatoes, Inc., (hereinafter "Respondent"), is a Mississippi corporation, whose mailing address is P.O. Box 999, Gulfport, Mississippi 39501.

2. Pursuant to the licensing provisions of the Act, license number 681081 was issued to Respondent on December 20, 1967. This license has been renewed annually, but terminated on December 20,

1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period April 1984 through April 1985, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or balances thereof, in the total amount of $165,635.43 for 52 lots of perishable agricultural commodities, purchased, received, and accepted in interstate commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

ORDER

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above be published.

This order shall become effective on June 23, 1986.

Copies hereof shall be served upon the parties.

In re: GREEN VILLAGE FRUIT AND VEGETABLE, INC., PACA Docket No. 2-6845. Decided May 8, 1986.

Failure to pay promptly—application for license denied.

Jory Hochberg, for complainant.
Denise Langer, New York, NY, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding to discipline respondent and deny it a license was instituted by a Notice to Show Cause and Complaint filed on June 5, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture under the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; the "PACA"), applicable regulations (7 CFR 46.1 through 46.45), and Rules of Prac-

tice (7 CFR 1.130 through 1.151). The Notice to Show Cause and Complaint alleges that respondent, Green Village Fruit & Vegetable, Inc., violated section 2 of the PACA (7 U.S.C. 499b) by failing to make full payment promptly of the agreed purchase prices for 69 lots of mixed fruits and vegetables, all being perishable agricultural commodities, for a total of $259,618.92. Respondent filed an answer on July 22, 1985, in which it denied violating the PACA.

Oral hearing was held before me on December 5, 1985, in New York, New York. Complainant was represented by Jory M. Hochberg, Esq., Office of the General Counsel, U. S. Department of Agriculture, Washington, D. C. 20250. Respondent was represented by G. Oliver Koppell, 28 West 44th Street, New York, New York 10036. The complaint was amended at the hearing to include additional instances of respondent's alleged failures to make full payment promptly to H. Schnell & Co., one of the sellers originally named in the complaint.

Briefing was completed on April 25, 1986.

Upon consideration of the evidence of record, the arguments of counsel, and the proposed findings, conclusions and briefs filed by the parties, a finding is being entered that respondent committed repeated and flagrant violations of the PACA, and its application for a license under the PACA is being denied.

PERTINENT STATUTORY PROVISIONS

1. Sec. 2(4).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * * * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with

any such transaction; or to fail to maintain the trust as required under Section 5(c);

2. Sec. 4(a).

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided,* That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further,* That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 3(b), plus $5, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 3(b): *And provided further,* That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination;

3. Sec. 4(d)

(d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per cent of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . If after the investigation the Secretary believes that the applicant shall be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary

finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per cent of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . the Secretary may refuse to issue a license to the applicant.

4. Sec. 8(a)

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

PERTINENT REGULATIONS

Sec. 46.2(aa)

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

* * * * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

* * * * * * *

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then pay-

ment within the agreed upon time shall constitute 'full payment promptly', *Provided,* That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

FINDINGS OF FACT

1. Respondent is a New York corporation whose address is New York City Terminal Market, No. 220A, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the PACA, on January 26, 1984, license number 840616 was issued to Sechin K. Kim, also known as Se Chin K. Kim, to do business in his own name. Since on its first anniversary date, Mr. Kim indicated on his renewal application that his business had incorporated, Mr. Kim was advised that it was necessary to apply for a corporate license. The individual license of Mr. Kim terminated on January 26, 1985, and thereafter, Green Village, of which Mr. Kim is the sole officer, director and stockholder continued to operate subject to the PACA without a valid license. On May 8, 1985, respondent, Green Village Fruit & Vegetable, Inc., applied for a PACA license.

3. During the period November 1984 through January 1985, Sechin K. Kim purchased, received, and accepted, in interstate and foreign commerce, 69 lots of mixed fruits and vegetables, all being perishable agricultural commodities, from three sellers set forth in the complaint for a total obligation of $255,169.82. He failed to promptly pay such obligations. During the period February 1985 through April 1985, Sechin K. Kim, now incorporated as respondent, purchased additional lots of mixed fruits and vegetables from one of these sellers and failed to promptly pay in full the agreed purchase prices and this seller, at the time of the hearing, was still owed approximately $90,000, although the other two sellers had been paid in full.

CONCLUSIONS

Respondent's failures to fully and promptly pay the agreed purchase prices for numerous lots of perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant and/or repeated violations of section 2 of the PACA (7 U.S.C. 499b). Respondent should be refused the PACA license for which it has made application because respondent and its sole officer, director and stockholder, Sechin K. Kim, engaged in conduct of a character prohibited by the PACA which makes it unfit to engage in the business of a commission merchant, dealer or broker.

DISCUSSION

A. Introduction

This is a combined Notice to Show Cause and disciplinary proceeding brought pursuant to sections 4 and 8 of the PACA (7 U.S.C. 499d, 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. (H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey* v. *Guerin,* 443 F.2d 584 (6th Cir. 1971); *O'Day* v. *George Arakelian Farms, Inc.,* 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." *Id.* at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930) 3. *See, also, George Steinberg and Son, Inc.* v. *Butz,* 491 F.2d 988 (2d Cir.), *cert. den.,* 419 U.S. 830 (1974). Complementary to this enforcement scheme, the Secretary has the authority to refuse to issue a license to an applicant which has committed the kind of acts which are prohibited under the PACA.

The purpose of the present proceeding is to determine whether respondent violated section 2(4) of the PACA (7 U.S.C. 499b(4)) and, if so, the appropriate sanction, if any, to be imposed, as well as whether respondent is unfit to be granted the new PACA license for which it has made application.

B. Respondent Violated the PACA

Section 2(4) of the PACA (7 U.S.C. 499b(4)) makes it unlawful, *inter alia,* for any commission merchant, dealer, or broker as defined by the act (7 U.S.C. 499a(5)(6) and (7)), to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. "Full payment promptly," under Departmental regulation (7 CFR § 46.2(aa)(5)) requires that the agreed purchase prices for produce be paid in full within 10 days after the day on which the produce is accepted. Respondent stipulated at the hearing that full payment was not made promptly, as required by the regulations, for all of the perishable agricultural commodities accepted from Kleiman-Hochberg and D'Arrigo Brothers, as tabulated on

page 4 of the complaint, and that these amounts remained overdue for six months or more. Although complainant has stipulated that the indebtedness to D'Arrigo and Kleiman-Hochberg which was alleged in the complaint has now been fully paid, this does not alter the fact of the violations. *See, Baltimore Tomato Company, Inc.*, 39 Agric. Dec. 412 (1980); and *V.P.C., Inc., t/a Peter T. Glakas Produce*, PACA Docket No. 2-5844 (April 14, 1982).

Although respondent did not enter into any stipulations respecting its indebtedness to the remaining seller, H. Schnell & Co., it offered no evidence to contest the allegations that it failed to pay promptly for the perishable agricultural commodities shown on the invoices contained in Complainant's Exhibit Nos. 44 through 71, which cover the time period covered by the complaint. Instead, respondent contends that the indebtedness resulting from these particular transactions has now been paid, and that respondent's indebtedness at the time of the hearing to H. Schnell arose from subsequent transactions (for which the complaint was amended) and should not be considered. However, the testimony of Mr. Golding, H. Schnell's Office Manager, Complainant's Exhibit No. 72, and respondent's admissions at the hearing, provide ample support for the conclusion that respondent had failed to make timely payment and still owed for approximately $90,000 of perishable fruits and vegetables which it purchased and accepted from Schnell in interstate commerce.

quirements yet it continued to buy knowing that each purchase would result in another violation. A licensee is required under the PACA to have sufficient capital with which to operate. Respondent did not and, consequently, could not pay its suppliers. Under these circumstances, it must be concluded that respondent was operating in careless disregard of the payment requirements of the PACA, and that its consequent violations were willful. *Atlantic Produce, supra,* 35 Agric. Dec. 1631, 1961; *Rudolph John Kafcsak,* 39 Agric. Dec. 683 (1980), *aff'd. mem.,* 673 F.2d 1329 (6th Cir. 1981).

C. Disciplinary Sanction and Denial of New PACA License

If a licensee who has failed to pay for produce is not current in his payments at the time the oral hearing is convened, the appropriate disciplinary sanction is revocation of an existing PACA license. *See Gilardi Truck & Transportation, Inc.,* decided January 27, 1984, and *Finer Foods Sales Co., Inc.* v. *John R. Block,* 708 F.2d 774 (D.C. Cir. 1983). This was explained to respondent's counsel in advance of the hearing which was delayed to give respondent time to become current. But respondent still owed $90,000 to a produce seller at the time of the hearing. From that point on, my discretion in this case, under controlling Departmental policy, became most limited. This, too, was explained to respondent's counsel who was advised that unless he could arrange for a voluntary settlement with complainant before I entered my decision, I would have to treat this as a "no pay" rather than a "slow pay" case which, under *Gilardi* and other Departmental decisions, requires the revocation of an existing license. As a disciplinary sanction for respondent's violations of section 2(4) of the PACA, complainant seeks, instead of revocation, a finding that respondent, an unlicensed entity, committed repeated and flagrant violations of the Act and that the finding be published. This sanction has the same effect on a violator and persons responsibly connected with a violator as does license revocation. *Jarosz Produce Farms,* 42 Agric. Dec. ____ (Oct. 5, 1983).This sanction is appropriate under controlling Departmental policy in light of the number of violations, the seriousness of the violations, the impact of violations on the industry as a whole, and the financial status of respondent. Taking all these factors into consideration, the sanction sought by complainant shall be granted. *See, J. H. Norman & Sons Distributing Co.,* 37 Agric. Dec.705 (1978); *G. Steinberg & Son, supra,* 32 Agric. Dec. 236.

In addition to being a disciplinary proceeding, this is a proceeding to show cause why respondent's pending license application should not be denied. The burden of proof in such a proceeding initially falls upon the complainant who must demonstrate good

reason why the license application is being challenged. However, once the complainant has provided such good reason, the burden of proof shifts to the applicant to show cause why its application should be granted. *Pappas Produce,* 36 Agric. Dec. 684 (1977).

In the present case, complainant has established that respondent's sole officer, director and stockholder violated section 2(4) of the PACA by failing to make prompt payment to three sellers in excess of $250,000 worth of mixed fruits and vegetables. The evidence further established that as of the date of the hearing, respondent owed long overdue debts in a total amount of approximately $90,000 to one of these sellers, H. Schnell & Co. This evidence provides substantial and sufficient reason for the denial of respondent's license application. Respondent's evidence does not sustain the contrary conclusion.

Respondent's sole witness and President, Mr. Kim, made absolutely no attempt to refute or deny his failure and that of respondent to pay for the transactions alleged in the complaint, or the subsequent transactions with H. Schnell shown on Complainant's Exhibit No. 72. Instead, he explained the failures to pay these debts as they became due on the basis of unpaid loans totalling $500,000 he made to friends some two years ago. By so doing, Mr. Kim left his business undercapitalized which is a circumstance that is never condoned under the Act. The Department of Agriculture treats its issuance of a PACA license to an applicant as an attestation to the industry that the applicant is believed able and determined to comply with the Act's financial requirements. *V.P.C. Inc.,* 41 Agric. Dec. 734 (1982). Respondent's financial history prevents the Secretary from so attesting. Under these circumstances, the respondent's license application shall be denied.

ORDER

Respondent, Green Village Fruit & Vegetable, Inc., has committed repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)).

The application for a license made pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) by respondent is denied.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[Decision and Order became final on June 16, 1986.]

In re: BATTAGLIA DISTRIBUTING COMPANY, INC., PACA Docket No. 2-7167. Decided June 18, 1986.

Violated suspension as dealer—application granted but suspended for 90 days—Consent.

Edward M. Silverstein, for complainant.
Leroy W. Gudgeon, Northfield, IL, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a Notice to Show Cause proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter the "PACA"). The Notice to Show Cause was filed on May 1, 1986, alleging that the respondent was unfit for the issuance of a license under the PACA. A hearing was scheduled on May 22, 1986. During negotiations which took place at the hearing, the parties agreed to an amicable settlement of this matter. Therefore, pursuant to this agreement, the following decision and order is issued without further proceeding.

FINDINGS OF FACT

1. Respondent, Battaglia Distributing Company, Inc., is a corporation whose business address is 2545 South Ashland Avenue, Chicago, Illinois 60608.

2. The persons who are responsibly connected with respondent are as follows: Frank P. Battaglia, president, director, and 33.3 percent stockholder; Anthony J. Battaglia, treasurer, director, and 33.3 percent stockholder; Joseph L. Battaglia, secretary, director, and 33.3 percent stockholder; and Ernest A. Battaglia, vice-president.

3. August Battaglia Processing Company, an Illinois Corporation, whose address is also 2545 South Ashland Avenue, Chicago, Illinois 60608, was issued license no. 841376 pursuant to the licensing provisions of the PACA. This license is still in effect, and is next subject to renewal on June 6, 1986. The persons who are responsibly connected with this company are as follows: Frank P. Battaglia, vice-president, treasurer, director, and 33.3 percent stockholder;

Anthony J. Battaglia, president, director, and 33.3 percent stockholder; Joseph L. Battaglia, secretary and 33.3 percent stockholder; and Ernest Battaglia, vice-president. Also, August J. Battaglia and George Battaglia are vice-presidents.

4. August Battaglia Company, Inc., is an Illinois corporation whose address is 15 South Water Market, Chicago, Illinois 60608, which was issued PACA license no. 106488 on March 27, 1947. This license terminated on March 27, 1986, pursuant to section 4(a) of the PACA (7 U.S.C. 499d(a)) when the firm failed to pay the required annual renewal fee. The persons who were responsibly connected with this company were as follows: Frank P. Battaglia, vice president, treasurer, and director; Anthony J. Battaglia, president and director; Joseph L. Battaglia, secretary and director; and Ernest Battaglia, vice-president. Also, August J. Battaglia and George C. Battaglia were vice-presidents, and A. Battaglia Holding Company was its 100 percent stockholder.

5. An audit of the business records of August Battaglia Company, Inc., was conducted from January through March 1985, in connection with a reparation complaint filed against it pursuant to section 6 of the PACA (7 U.S.C. 499f) by a shipper. This audit established that, from September 1983 through November 1984, August Battaglia Company, Inc., failed to account truly and correctly, and also failed to make full payment promptly, to five shippers of the net proceeds realized from the sale of fruit, all being perishable agricultural commodities, received and accepted on consignment, in interstate commerce. The amount which August Battaglia Company, Inc., was found to have underreported and underpaid to its principals totalled $50,901.54. August Battaglia Company, Inc., agreed to, and did, make full restitution to these shippers. Thereafter, pursuant to section 6(c) of the PACA (7 U.S.C. 499f(c)), a disciplinary complaint was filed and served upon August Battaglia Company, Inc. The corporation answered the complaint, admitted the violations of the PACA, and consented to the suspension of its PACA license for 45 days. On January 22, 1986, a Decision and Order was issued suspending the PACA license of August Battaglia Company, Inc., for the 45 day period January 22, 1986, through March 7, 1986. *See* PACA Docket No. 2–7048. By letter dated January 27, 1986, the responsibly connected persons affiliated with August Battaglia Company, Inc., named in paragraph 4 above, were advised as to the issuance of the Decision and Order, and also were advised that they were under employment and licensing restrictions during the license suspension period.

6. During the January 22, 1986, through March 7, 1986, suspension of the PACA license of the August Battaglia Company, Inc.,

August Battaglia Processing Company did not operate as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. 449a).

7. On May 22, 1985, an application for a license pursuant to the provisions of the PACA was received from respondent. Respondent stated on its application that it had conducted business subject to the PACA since May 21, 1985. This application was returned to respondent for correction and amendment by a certified letter dated June 11, 1985, which was received by respondent on June 14, 1985. The firm resubmitted a completed application on July 23, 1985, but by letter dated August 12, 1985, requested that the application be withdrawn. Accordingly, under cover of certified letter dated August 22, 1985, and received by respondent on August 26, 1985, the application was returned. At that time respondent was warned that it could not operate subject to the PACA without holding a valid and effective license.

8. Despite being warned that it could not operate without holding a valid and effective license, respondent continued to operate as a dealer, as that term is defined in section 1 of the PACA (7 U.S.C. 499a). Such operation continued until on or about February 26, 1986.

9. Even before receiving the August 22, 1985, warning letter, respondent had operated as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. 499a), but without holding a valid and effective PACA license in that, since at least August 22, 1983, it purchased numerous lots of perishable agricultural commodities in interstate and foreign commerce in sufficient quantities to require being licensed.

10. The acts of August Battaglia Company, Inc. in failing to truly and correctly account and make full payment promptly for consignment transactions as found in paragraph 5 above, constitute willful, repeated and flagrant violations of the PACA and also constitute practices of a character prohibited by the PACA.

11. The acts of respondent in operating as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. § 499a), without holding a valid and effective license in violation of section 3 of the PACA (7 U.S.C. § 499c), from August 22, 1983, through February 26, 1986, and in particular during the 45-day period, January 22, 1986, through March 7, 1986, when the license of August Battaglia Company, Inc., was suspended, as found in paragraphs 9 and 10 above, constitute willful, repeated and flagrant violations of the PACA and also constitutes a practice of a character prohibited by the PACA.

CONCLUSION

The acts of August Battaglia Company Inc. referred to in paragraph 10 of the Findings of Facts as well as the acts of respondent referred to in paragraph 11 of the Findings of Facts, in particular respondent's in operation as a dealer as that term is defined in section 1 of the PACA without holding a valid and effective license during the period January 22, 1986, through March 7, 1986, when it was barred from so operating as a consequence of the suspension of its sister corporation August Battaglia Company, Inc., constitutes a willful, repeated and flagrant violation of the PACA, and also constitutes a practice of a character prohibited by the PACA. In view of this, the following order is issued.

ORDER

The respondent's application for a PACA license shall be granted on the effective date of this order.

Respondent's license is suspended for 90 days from the effective date of this order.

The effective date of this order is June 30, 1986.

Chief Administrative Law Judge John A. Campbell retains jurisdiction of this matter until 120 days after the effective date thereof. During this 120 day period, the complainant may file a motion seeking revocation of respondent's license on the basis that respondent, any of its responsibly connected individuals, or any entity with which its responsibly connected individuals, are employed as that term is defined in section 1(10) of the "PACA" (7 U.S.C. § 499a(10), has violated the terms of the 90 day suspension order.

If the respondent and/or any of its responsibly connected persons and/or any entity which employs its responsibly connected persons violate the terms of the 90 day suspension ordered above, the respondent consents to the revocation of its PACA license.

Copies of this order shall be served upon the parties.

REPARATION DECISIONS

MIC BRUCE, INC., a/t/a SINGER'S, *v.* CHIQUITA BRANDS, INC., PACA Docket No. 2-6608. Decided May 1, 1986.

Uniform Commercial Code—Custom of the industry—course of conduct—good delivery standards for bananas—proof of damages—reparation awarded.

Although there are no published standards to determine whether bananas make good delivery, the Secretary has jurisdiction to make such a finding, and will do so by applying a reasonable test. Where respondent claims it is not liable for damages because the custom of the industry is to settle on basis of f.o.b. price plus costs, it must prove such custom by showing specific instances. Since respondent failed to do so, and failed to prove acquiescence in such method by complainant, it is liable for damages in those cases in which complainant proved the bananas did not make good delivery.

Dennis Becker, Presiding Officer.
Stephen P. McCarron, Esquire, Silver Spring, MD, for complainant.
John G. Ingram, Esquire, New York, NY and *Richard J. Reisert, Esquire,* New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $66,697.25, plus interest, in connection with fourteen transactions involving the purchase and sale of bananas during the months of March through May, 1983, in interstate and foreign commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting that it owed complainant $9,286.00, and denying any liability to complainant with respect to the remaining $57,411.25. An order requiring respondent to pay complainant the undisputed amount was issued on September 18, 1984, leaving the question of liability for the remainder to be resolved in an oral hearing. Depositions were taken in which both parties were represented, and an oral hearing was held in Montvale, New Jersey, on June 11, and 12, 1985. Both parties were represented by counsel. Thereafter, both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Mic Bruce, Inc., also trading as Singer's, hereinafter referred to as respondent or Singer's, is a corporation with an address at Unit 26, 4000 Orange Avenue, Northern Ohio Food Ter-

minal, Cleveland, Ohio 44115. At the time of the transactions at issue in this proceeding complainant was licensed under the Act.

2. Respondent, Chiquita Brands Inc., hereinafter referred to as respondent or Chiquita, is a corporation with an address at 15 Mercedes Drive, Montvale, New Jersey, 07645. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. Complainant and respondent had engaged in business with each other for at least two years prior to the date of the transactions involved in this proceeding. In those prior transactions complainant purchased bananas from respondent on frequent occasions. On three occasions prior to the transactions at issue in this proceeding complainant notified respondent that the bananas which it purchased were not in accord with contract specifications. Respondent afforded complainant adjustments for each of those transactions based upon what has been its longstanding practice in making adjustments when bananas arrived at their destination in other than a condition which is in accordance with contract specifications. Complainant accepted the amounts of money offered by respondent with respect to each of those transactions. However, with respect to two transactions which occurred in November 1982, complainant accepted the allowances under protest. Complainant stated in a letter dated December 29, 1982, that it did not have time to contest what it believed to be unfair settlements with respect to the two transactions, but that it would not permit such alleged unfairness to occur in the future. It also stated that one way or the other respondent would end up having to pay for its supposedly arbitrary method of settling contract disputes.

4. There are no published federal standards with respect to the quality or condition which bananas must manifest at shipping point or destination in order to make good delivery. Respondent, however, has developed and applied for many years its own method of granting adjustments to purchasers of its bananas based on the free on board price paid by the purchaser plus the purchaser's expenses, such as trucking, sorting and other handling, as computed by respondent. Respondent has not granted any adjustments based upon lost profits because the bananas did not meet contract specifications. Respondent applied its usual method with respect to the three transactions which occurred prior to 1983 in which complainant filed claims for adjustments. Respondent also utilized its own method of computing adjustments with respect to the fourteen transactions at issue in this proceeding, but did not specify in its accountings to complainant how it arrived at its final computation as to what the adjustments should be.

5. Commercial bananas are not grown in the United States. Rather, they are grown in Latin America, and shipped from the various countries to ports in the United States aboard vessels, where they are unloaded for further transportation to ultimate destination. Transportation from Latin America to port in the United States normally takes less than one week.

6. When bananas are loaded and shipped their skin has a dark green color. Respondent performs an inspection at shipping point in Latin America. The bananas are shipped under controlled temperature conditions in the vessels, so as to assure that they arrive in good commercial condition. At the port of destination the bananas are inspected again as they are unloaded to ascertain that their condition has not deteriorated during transit. This is called a discharge inspection. In addition, a sample of bananas is taken from the full shipment, and set aside by respondent for further inspection at a later time so as to determine whether after shipment from port to ultimate destination the bananas should have continued to be in good commercial condition. This is called an after-ripe inspection.

7. After the inspection on unloading the bananas from the vessel, bananas are reloaded aboard trucks or other transport for transportation to their ultimate destination. They are generally sold by respondent to the buyer free on board the port of discharge. Instructions are given to the transporters of the bananas as to the temperatures that are to be maintained during inland transit.

8. At destination, the bananas are unloaded by the receiver, and taken into its place of business for further ripening and eventual sale. Ripening occurs in special rooms for that purpose, and can be controlled so as to take as much as ten or twelve days to reach the desired amount of ripeness. Chiquita's practice has been that in the event the receiver or buyer determines that the bananas do not meet quality and condition standards under the applicable contract, the buyer must pay the full contract price, and wait for any potential refund from respondent. In order to prove that the bananas were not in accordance with contract specifications a receiver or buyer is required to notify respondent within 48 hours of their arrival that it believes the bananas have quality or condition defects. The receiver or buyer must also file a formal written complaint in which it specifies the amount of damages it claims within 60 days after it has received the bananas. Respondent provides its own inspector to ascertain the quality or condition of the bananas as soon after it receives notification as is possible. It is generally accepted that the inspections provided by respondent are excellent in terms of quality, and complainant acknowledged such is the

case. It is the usual practice of Chiquita to inspect only for the defects complained about in the claim filed by the receiver or buyer within 48 hours of their receipt, although at times it may also look for defects complained about in the written complaint.

9. On March 23, 1983, the vessel Rio Babahoya docked at Albany, New York. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from that ship on that date, and loaded three trucks for delivery to complainant in Cleveland, Ohio. The sale price was $10.00 per carton for each load, f.o.b., plus $1,038.00 as a fuel surcharge, $934.20 for handling, and $45.00 for temperature recorders, for a total contract price for the three transactions of $27,967.20. Complainant made timely payment of this amount to respondent. Complainant also paid $1,742.31 for freight, bringing its total costs to point of destination to $29,709.51. One shipment with 875 cartons arrived on March 24, 1983, and the other two shipments arrived at respondent's place of business on March 25, 1985. They involved 870 and 850 cartons. The inspection at the port of discharge showed that the pulps of those bananas which were inspected ranged between 56 degrees and 58 degrees fahrenheit. The temperature recorders with respect to the load which arrived on March 24, 1983, and one of the loads which arrived on March 25, 1983, showed that the temperature of the carrying portion of the truck was 58 to 60 degrees fahrenheit and 64 to 66 degrees fahrenheit, respectively. The pulp temperatures of those two loads were recorded on arrival in Cleveland as 57 to 58 degrees fahrenheit and 62 to 63 degrees fahrenheit, respectively. The pulp temperature of the third truck on arrival was shown to be 54 to 58 degrees fahrenheit. Complainant received, accepted and unloaded the three truckloads of bananas. It also notified respondent within 48 hours of acceptance that it believed the bananas had difficulties, and stated orally that it believed that they were ripe and turning. Subsequently, complainant filed a written complaint in which it stated that "fruit was showing a chill effect w/out any other characteristics of chill except the grey cast to the peel. All temperatures w/in tolerance." In the remarks section of that same form respondent wrote "complaint on discoloration (and after ripening) on arrival. Customer requested our QC inspection." The bananas were inspected on March 28, 1983. The inspection showed with respect to the load which arrived on March 24, 1983 that eight percent of the bananas were ripe and turning or ripe. With respect to the truckload containing 850 cartons which arrived on March 25, 1983 it showed 14 percent of the cartons were ripe and turning or ripe. Complainant claimed to have lost $1,458.10 with respect to the load which arrived on March 24, 1983,

and $2,598.50 and $1,710.25 with respect to the two loads which arrived on March 25, 1983. Its total claim with respect to the three loads was $5,766.85. Complainant conveyed these claims to respondent. Sometime thereafter respondent made a settlement offer of $4,000.00. Respondent did not explain to complainant how it arrived at the $4,000.00 settlement figure. Having previously paid the contract price for the three loads of bananas in full complainant accepted the $4,000.00 as a partial settlement.

10. On March 31, 1983, the vessel Rio Sulaco docked at Charleston, South Carolina. It contained bananas shipped in foreign commerce by respondent. The bananas were unloaded from the Rio Sulaco on March 31, 1983, and placed aboard trucks for shipment to various receivers. Four loads were destined for complainant. The sale price was $9.00 per carton for each load, f.o.b., plus $1,358.40 as a fuel surcharge, handling charges of $1,154.00 and $90.00 for temperature recorders, for a total contract price for the four transactions of $33,167.04. Complainant made timely payment of this amount to respondent. Complainant also paid $3,483.99 for freight and $678.40 for handling, bringing its total costs to point of destination to $37,329.43. Two shipments arrived on April 2, 1983, one with 848 cartons and the other with 850. One shipment of 848 cartons arrived on April 4, 1983, and the fourth shipment with 850 cartons arrived on April 5, 1983. The bananas were inspected at the port of discharge and showed scorable defects between 3.4 percent and 4.1 percent with ripe and turning bananas between 0.8 percent and 1.5 percent. They showed pulp temperatures of 58 to 60 degrees fahrenheit. The pulp temperature on arrival on April 2, 1983 of one truck was 58 to 60 degrees fahrenheit. The pulp temperatures on arrival of the truck which arrived April 4, 1983 was 60 to 65 degrees fahrenheit. The temperature recorders with respect to the two loads which arrived April 2, 1983 showed carrying temperatures on the trucks of 55 to 56 degrees fahrenheit and 57 to 58 degrees fahrenheit, respectively. There were no temperature recordings shown with respect to the loads which arrived on April 4, 1983 and April 5, 1983. With respect to all four loads complainant made a request for inspection by respondent within 48 hours after the bananas arrived. With respect to the two loads which arrived on April 2, 1983, complainant based its initial claim for reimbursement on the fact that the bananas showed a grey color. With respect to the load that arrived on April 4, 1983, complainant filed its initial claim on the basis that the bananas were ripe and turning, and subsequently made its written claim on the basis that the bananas showed chill. All loads were inspected by respondent. The record shows specifically only with respect to the load of bananas

which arrived on April 4, 1983, that it was inspected on April 13, 1983. However, all loads were inspected on or about that date. The inspection reports for all loads show that 30 percent of the bananas had underpeel discoloration. With respect to the two loads of bananas which arrived on April 2, 1983, complainant claimed it lost $918.50 and $2,328.75, respectively, for a total loss on the two loads of $3,247.25. Respondent declined to give any settlement with respect to these two loads, but did not state its reasoning in declining to do so. With respect to the loads which arrived on April 4, 1983, and April 5, 1983, complainant claimed it lost $2,597.64 and $2,148.02, respectively, for a total claim of $4,745.66. After inspection respondent offered $1,365.00 in settlement without explaining its reasons why. Having previously made full payment with respect to these two loads complainant accepted the $1,365.00 as a partial settlement.

11. On April 7, 1983, the vessel Chion Trader docked at Charleston, South Carolina. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from the ship on that date, and loaded three trucks for delivery to complainant in Cleveland, Ohio. The sale price was $9.50 per carton for each load, f.o.b., plus $1,030.00 as a fuel surcharge, $875.50 for handling, and $67.50 for temperature recorders, for a total contract price for the three transactions of $26,435.50. Complainant made timely payment of this amount to respondent. Complainant also paid $2,771.20 for freight, bringing its total costs to point of destination to $29,206.70. One truck carrying 875 cartons of bananas arrived on April 11, 1983, and the other two trucks, each carrying 850 cartons of bananas, arrived on April 12, 1983. The inspection at the port of discharge showed that the pulps of those bananas which were inspected ranged between 56 and 60 degrees fahrenheit. The temperature recorders with respect to the carrying portion of the trucks were 60 to 64 degrees for the load which arrived on April 11, 1983, and 58 to 66 degrees and 58 to 61 degrees, fahrenheit, respectively, for the loads which arrived on April 12, 1983. Inspections at the time of arrival show that the pulp temperatures of the bananas were 60 to 61 degrees, 59 to 61 degrees, and 59 to 60 degrees, respectively. Complainant received, accepted and unloaded the three truckloads of bananas. Complainant filed a complaint with respect to the condition of the three loads within 48 hours of their arrival, stating that they were mutilated, old, scarred, and of mixed grade. Subsequently, complainant filed a written complaint in which it stated that the reason for the complaint was that "upon ripening fruit was showing an off-color cast of grey as if to show chill without any other characteristics of chill and temperatures O.K. on ar-

rival." In the remarks portion of that same form respondent wrote "QC inspection after ripening brown discoloration." The bananas were inspected on April 13, 1983. The inspection showed with respect to two of the three loads that 35 percent (for the load arriving April 11, 1983) and 42 percent (for one load arriving April 12, 1983), of the clusters did not meet specifications. The inspection also appeared to show there was considerable underpeel discoloration. Complainant claimed that it lost $1,419.26, $1,611.00, and $1,924.25 with respect to the three loads for a total claim of $4,954.51. Complainant conveyed these claims to respondent. Respondent offered $2,000.00 in settlement with respect to one of the three loads which contained 850 cartons because it knew the bananas in that load had come from a hold in which there was considerable underpeel discoloration. Having previously paid the contract price for the bananas, complainant accepted the $2,000.00 offered as a partial settlement.

12. On May 4, 1983, the vessel Rio Babahoya docked at Albany, New York. It contained bananas shipped in foreign commerce by respondent. The vessel had been on the seas for a period of 12 days. Respondent unloaded the bananas on that date and loaded three trucks from Hold No. 4 for delivery to complainant in Cleveland, Ohio. The sale price was $11.50 per carton for each load, f.o.b., plus $1,020.00 as a fuel surcharge, and $918.00 for handling, for a total contract price for the three transactions of $31,263.00. Complainant made timely payment of this amount to respondent. Each truck contained 850 cartons. One truckload of bananas arrived at respondent's place of business on May 5, 1983, and two truckloads arrived on May 6, 1983. The inspection at port of discharge showed that the pulps of those bananas which were inspected ranged between 57 and 60 degrees fahrenheit. The bananas which came from Hold No. 4 showed that 3 percent were ripe and turning, and that there were a number of other condition defects. The pulp temperatures of the three loads on arrival in Cleveland were recorded as 57 to 60 degrees, 59 to 60 degrees, and 62 to 65 degrees fahrenheit, respectively. Complainant received, accepted and unloaded the three truckloads of bananas. Complainant notified respondent it was filing a claim on May 11, 1983. It filed a written complaint on or after that date in which it stated "These loads appeared to be old fruit. Upon arrival showed a slight discoloration, as if they were chilled, but temperatures were within tolerance. Upon ripening showed excessive discoloration and scarring with deep bruises—crown mold and occasional rot." The basis of its complaint was underpeel discoloration and the fact that the bananas were old. Respondent inspected the bananas on May 13, 1983. Its inspection re-

sulted in findings that "fruit appears fairly decent at end, but after processing too many show poor color but most not from chilling, and "100 boxes examined—sample divided between 3 rooms and 3 loads all gassed—avg color of all clusters 3—3½ OC—scattered throughout—34% med/sev—5%—off color from chilling 15%—Med/sev. 4%. Mostly large full mature fruit, 5% of boxes clusters showing ugly brownish outer peel discoloration and excessive amounts of CM/CR—NI/NR very mixed appearance, poor to fair." With respect to the three truckloads of bananas complainant claimed a total loss of $10,608.20. Respondent granted no adjustment with respect to the three truckloads.

13. On May 27, 1983, the vessel Olancho docked at the port of Albany, New York. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from that ship on that date, and loaded one truck on that date for delivery to complainant in Cleveland, Ohio. The sale price was $10.00 per carton for 850 cartons, f.o.b., plus charges for a fuel surcharge, handling and a temperature recorder of $678.00, for a total contract price of $9,178.00. Complainant made timely payment of this amount to respondent. The shipment arrived at complainant's place of business on May 31, 1983. Complainant received, accepted and unloaded the bananas on that date. It immediately complained to respondent about the condition of the bananas. The inspection at port of discharge showed that the pulps of the bananas ranged from 58 to 60 degrees fahrenheit. It also showed that 90 percent of the clusters met specifications. The truckload arrived at complainant's place of business in Cleveland, Ohio on May 31, 1983, where it was received, accepted and unloaded. Upon arrival the temperature gauge for the carrying portion of the truck showed that the air temperature ranged during transit from 58 to 64 degrees fahrenheit. The pulps of the bananas on arrival were shown to be 61 to 62 degrees fahrenheit. Complainant filed an oral claim, and requested within 48 hours of their arrival that respondent inspect the bananas. The basis of its oral complaint was that the bananas showed mold, were old, ripe and turning, scarred and short. The basis of its written claim was the same. Complainant also said "This load was absolute *garbage*. The *WORST* load of bananas I ever received since entering the banana business." This complaint was filed on July 20, 1983. The bananas were inspected by respondent on June 1, 1983. The inspections showed that 45 percent of the bananas met specifications. Complainant claimed a loss with respect to the truckload of bananas of $6,369.10 based on costs of $9,178.00 less $3,424.50 fetched on resale as shown by its account of sale. Respondent of-

fered $1,921.00 in settlement. Complainant accepted the $1,921.00 as partial payment in settlement of the claim.

14. The total amount claimed by complainant with respect to the 14 loads of bananas described in paragraphs 8 through 12, above, was $35,691.57. The total amount granted by respondent in settlement was $9,286.00, leaving $26,405.57 of the initial claims by complainant unsatisfied.

15. Subsequent to the denials of the claims in the amount of $26,405.57, and more than 60 days after delivery, complainant on the advice of counsel, claimed allegedly lost profits as part of its damages, thereby raising its total claim to $66,697.25 less the $9,286.00 which had been granted by respondent, leaving a net amount it claimed as owed to it of $57,411.25, plus interest.

16. A major basis for the claims of damages with respect to the 14 transactions was that the bananas showed underpeel discoloration. Other claim bases were stated to be chill effect, grade, color, chill, off color, discoloration, and rot. With respect to the load which was unloaded from the Olancho there does not appear to have been a claim as regards chill effect or underpeel discoloration. Chill effect is generally manifested by a grey tone to the outer skin of the banana or speckling on the underpeel side of the banana. With very rare exceptions these two physical characteristics only occur if the bananas have been chilled below proper temperatures. The evidence of record with respect to the 13 transactions for which chill damage or underpeel discoloration was claimed shows that to the extent they were available at hearing the pulp temperatures of the bananas on arrival at the complainant's place of business in Cleveland, Ohio were at or above the pulp temperatures of the bananas when the bananas were discharged at port from the vessels which carried them in foreign commerce, with the exception of the load from the Rio Babahoya which arrived at the port of Albany on March 23, 1983 and at complainant's place of business with 850 boxes on the truck on March 25, 1983. There, the temperature of the pulp of the bananas on arrival was 54 to 58 degrees fahrenheit, whereas the temperature of the pulp of the bananas at discharge was 56 to 58 degrees fahrenheit. With respect to two transactions on the Rio Sulaco which arrived at the port of Charleston on March 31, 1983, pulp temperatures on arrival were not shown. In addition, the temperature devices contained in the carrying portion of the truck with respect to seven of the thirteen transactions showed that the bananas were carried at temperatures at or above the minimum at which they must be carried to obviate the occurrence of chilling. Records were not provided with respect to the temperatures at which the bananas were carried

from port of loading to port of discharge by respondent. Neither did complainant provide records as to the temperatures at which it ripened the bananas after it accepted delivery. The minimum temperature at which bananas may be held over a period of time without risk of chill effect, as manifested by grey color or underpeel discoloration, is 55 degrees fahrenheit. Even if the bananas were carried at a temperature slightly below 55 degrees fahrenheit for a period up to eight hours, it is unlikely that chill effect would occur.

17. A formal complaint was filed in this proceeding on April 3, 1984. An informal complaint was filed on September 21, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

The issues in this proceeding are unique and difficult of resolution. This is particularly so because, although there were no federal inspections of the bananas either at port of discharge or at complainant's place of business with respect to the fourteen transactions at issue in this proceeding, it is clear that both parties accept the validity of inspections by respondent insofar as the accuracy of the findings is concerned. However, the parties differ as to the interpretation which should be placed upon those findings. The case is further compounded by the fact that there are no federal standards with respect to condition or quality factors for the bananas. Therefore, a necessary step in the resolution of the dispute is to determine whether, given the nature and kind of defects found in the bananas upon respondent's inspections both at point of discharge and at complainant's place of business the bananas made good delivery. In effect, the tribunal must engraft upon this case reasonable tests as to the percentage of condition defects bananas may have at destination for it to determine whether they made good delivery. We derive some help in this regard through the conduct of respondent in granting allowances. We are also helped to some extent by looking at federal standards for other fruit, and to a lesser degree by an analysis of complainant's accounts of sale, which show the extent to which complainant lost money when it resold the bananas. In addition, in those instances in which we may find the bananas did not make good delivery, we must determine whether the adjustments in price granted by respondent were appropriate.

Complainant contends that it is entitled to damages, based upon the condition of the bananas when they arrived at its place of business. Although originally it filed lesser claims based primarily on its actual costs less sales price, it now contends that it is entitled to

the difference between the price the bananas would have fetched on resale at the market had they made good delivery and their actual value as manifested by the price fetched at resale. Respondent, on the other hand, contends that complainant cannot make such a claim. It offers three theories for why its computation and proffered allowances are proper. First, it claims that the custom of the trade with respect to bananas is such that the adjustments which are awarded when the shipper of the bananas finds that the receiver is entitled to an adjustment will be based on the free on board price plus expenses such as handling, trucking, and repacking that portion of the load which was not in suitable condition upon arrival. It also claims that insofar as complainant is concerned, by virtue of a course of conduct between complainant and respondent over a period of two years with respect to settlements, complainant has accepted respondent's methodology for the settlement of claims. Third, it claims that when it submitted its initial claims complainant engaged in a course of performance in which it used the delivered costs less the value of the bananas on resale, which course of performance restricted it to respondent's method of computing damages utilizing such delivered costs, which is the same as f.o.b. pricing plus other expenses.

Before discussing whether there are standards for condition defects which may be applied, we must address respondent's intriguing claim that since there are no federally published standards by which to determine whether bananas made good delivery Chiquita cannot be held to have violated section 2 of the PACA (7 U.S.C. § 499b). Section 6(a) of the Act (7 U.S.C. § 499f(a)) provides that "Any person complaining of any violation of any provision of Section 2 of this Act . . . may "file a complaint with the Secretary." Section 6(c) of the Act (7 U.S.C. § 499f(c)) provides for investigations of such complaints, and if the investigation reveals there may have been a violation, a hearing on the issues. These are the provisions which trigger reparation proceedings such as the one with which we are concerned here.

Section 2 of the PACA (7 U.S.C. § 499b) provides in pertinent part:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * * * *
>
> (2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or

contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

It is the above-quoted provisions with which we are concerned in this proceeding.[1]

Section 6(a) of the PACA clearly contemplates that in order to initiate a reparation proceeding the complaining party must allege that there has been a violation of section 2. Complainant did so. Section 6(d) of the Act (7 U.S.C. § 499f(d)) provides in pertinent part that after oral hearing the Secretary shall determine whether a dealer has violated any provision of section 2 of the PACA. The Secretary has made such determination in prior cases involving bananas in which their condition was in issue. See *Ecuadorian Fruit Import Corporation* v. *L & S Bananas*, 18 Agric. Dec. 485 (1959); *Ecuadorian Fruit Import Corporation* v. *Matthew Mercurio*, 16 Agric. Dec. 1245 (1957). Respondent's argument that there must be published federal standards before there can be a violation of section 2 must necessarily fail. There is no requirement in the PACAthat standards be established for the largest amount of condition defects a commodity of a given grade may show and still make good delivery. Rather, the Department has established such standards, primarily for commodities which are grown domestically, as the need has arisen to assist in the federal inspection of fruits and vegetables. The lack of federal standards does not affect the principle of whether a commodity makes good delivery. Rather, such standards establish a method by which to apply the principle. The lack of such standards merely forces this tribunal to find alternative, fair methods by which to determine whether a commodity has made good delivery.

In the usual reparation case under the Perishable Agricultural Commodities Act in which a party claims that a fruit or vegetable has not made good delivery there are published standards with respect to the condition which such product must meet at point of destination, dependent upon its grade, in order to meet contract specifications. Proof of a breach of contract on the part of the seller because it did not ship goods which made good delivery is most easily done based upon a federal inspection. When the product has greater than a specified percentage of condition defects it is said not to have made good delivery, as a result of which the receiver or buyer can then claim damages based upon the differential between the price fetched on resale and the market price, or on some other

[1] Respondent's brief addressed whether this portion of section 2 and section 2(5) were applicable. Section 2(5) deals with what is known as "misbranding" rather than breaches of contract, and need not be discussed further.

formula. Here, where there are no published standards with respect to the condition of bananas at the point of destination, and where the general practice is not to obtain a federal inspection, the resolution of a dispute in which a party claims that the bananas did not make good delivery is much more difficult. Based upon the evidence in this proceeding, in which both parties acknowledge that the inspections performed by the respondent are very well performed, and accurately describe the condition of the bananas both at port and at their ultimate destination, with one exception we accept the findings in those inspection reports as being accurate, and sufficiently probative of the issue of the condition of the bananas for use in this proceeding. See *Commonwealth Fruit & Produce Company, Inc.* v. *Idaho Falls Bonded Produce & Supply Co.*, 32 Agric. Dec. 1734 (1973); *Henry Skeba* v. *Battleground Farms*, 18 Agric. Dec. 183 (1959). However, our acceptance of such reports does not resolve the ultimate question with respect to condition, which is what standard should be applied.

In *Ecuadorian Fruit Import Corporation* v. *L & S Bananas, supra*, the issue as to how to deal with condition defects in bananas was raised indirectly. However, it is helpful in this proceeding. In that case the complainant complained that the bananas were green select, whereas respondent said that they were not. A witness testified that there were four grades of classification for bananas at that time; *i.e.*, select, special (reject), turning, and ripe, and that there was a differential in price between each such grade. The witness defined select as "green, proper grade and finger size, clean and uniform". The evidence in this proceeding shows that the classification of bananas has progressed substantially from the period of time involved in *Ecuadorian Fruit*. However, it is important to acknowledge that purchasers and sellers of bananas have long known that there are various grades which result in price differentials. Indeed, in *Ecuadorian Fruit* the tribunal stated that "there was an implied warranty that the bananas would ripen properly under normal ripening procedures. Complainant knew from the nature of the business, as well as previous sales to respondent, that respondent intended to ripen the green bananas prior to selling to stores." (Id. at 489) Such is also the case here. The testimony of complainant, through its witness Michael Zurowski, showed clearly that complainant expected to receive green bananas of high quality (a condition as to which Chiquita prides itself), that it had ripening rooms of excellent quality for bananas, and that it utilized these ripening rooms after receipt of the bananas in order to get them to an appropriate stage for resale to other businesses. It is both upon the receipt of the bananas by complainant, and during the subse-

quent ripening process that the bananas underwent in complainant's ripening rooms, that the various condition defects of the bananas became clearly discernible.

One way to determine whether the bananas made good delivery is to ascertain the percentage of condition defects which is tolerable at the time of shipment to or receipt at the ultimate destination by complainant. Such resolution is consonant with applicable PACA procedures for commodities for which there are published condition standards. This method is consistent with the requirement that a seller must sell goods which are in suitable shipping condition. The warranty of suitable shipping condition placed upon a seller of goods is defined in section 46.24(j) of the regulations issued pursuant to the PACA (7 CFR § 46.24(j)) "to mean, in relation to direct shipments, that the commodity at the time of billing is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery at the destination specified in the contract of sale without abnormal deterioration." *John M. Evans Produce Co.* v. *D. L. Piazza Company*, 18 Agric. Dec. 1452, 1454 (1959). An inspection of the various allowances for condition defects with respect to certain kinds of fruit of U.S. No. 1 quality for which standards have been promulgated reveals that the percentage of condition defects permissible at shipping point ranges between 8 and 10 percent, with between 4 and 5 percent permissible serious damage at shipping point. At destination, for those commodities for which there are tolerances given the range tends to be between 10 and 12 percent with a range of 5 to 6 percent for serious damage. For U.S. No. 1 cantaloupes, at shipping point there may be 8 percent condition defects by count with not more than 4 percent serious damage, and at destination 12 percent condition defects with not more than 6 percent serious damage (see 7 CFR 51.476). For U.S. No. 1 melons there may be 10 percent condition defects by count at shipping point with not more than 5 percent serious damage. No tolerances are given at destination (See 7 CFR 51.3744). For U.S. No. 1 nectarines there may be 8 percent condition defects by count with not more than 4 percent serious damage at shipping point and 12 percent condition defects with not more than 6 percent serious damage at destination (See 7 CFR 51.3150). For U.S. No. 1 pineapples there may be 10 percent condition defects by count at shipping point with not more than 5 percent serious damage. No tolerances are given at destination. (7 CFR 51.1486). For U.S. No. 1 watermelons there may be 10 percent condition defects by count at both shipping point and destination with not more than 5 percent serious damage. (See 7 CFR 51.1973).

An analysis of the standards for the fruits and melons described above shows that 10 percent grade and condition defects, with not more than five percent involving serious damage, at shipping point, including not more than one percent decay (rot), is a reasonable standard for bananas. In order to determine whether the bananas in the 14 transactions involved in this proceeding made good delivery, we shall apply that criterion as one of the methods by which we can draw conclusions. Both parties implicitly agree that underpeel discoloration or ripe and turning bananas are serious condition defects. It is axiomatic that rot is a serious condition defect. Therefore, it is reasonable to conclude that up to eight percent serious damage by discoloration should be allowed for the bananas to make good delivery at destination on an f.o.b. sale, but not more than three percent of that amount may be decay (rot). We apply a more lenient standard at destination because tolerances for such defects are typically more lenient there than at the shipping point. See *Pope Packing & Sales, Inc.* v. *Santa Fe Vegetable Growers Cooperative, Inc.*, 38 Agric. Dec. 101, 104-105 (1979); *Denise & Filice Packing Co.* v. *Super Food Services, Inc.*, 38 Agric. Dec. 744, 746-747 (1979). Under such circumstances this tribunal has a basis by which to make the necessary threshold determination for most of the transactions as to whether the bananas made good delivery based upon percentages of condition defects.

In evaluating whether the parties agreed on the method by which damages would be computed we conclude that there is no written document which sets forth the full understanding of the parties. The invoice sent by respondent with respect to each transaction contains some terms and conditions with respect to filing claims, but does not contain a statement of the methodology by which allowances will be granted. The obverse of the invoice states in pertinent part:

> 5. *Claims*—Notice of every claim in respect of Products must be given, orally or in writing . . . within 48 hours after the Products arrive at Purchaser's ripening premises. Such Notice will specify the defect or defects complained of, the date of such arrival and the date the Products will leave the ripening premises, and must assure Company an opportunity to inspect the Products. A formal claim or Company Form SC-10 with supporting loss statement must be filed with local Company representative within 60 days after giving such notice. Purchaser shall make all reasonable efforts to minimize losses in respect of products claimed to be defective. . . .

6. *Adjustments*—Company agrees to investigate every claim made as provided above and will make prompt and fair adjustment thereof if found meritorious. Purchaser, however, shall in every instance pay to Company the full amount of the invoice without any deduction or set off whatsoever.

The above terms had been in effect for about 25 years prior to 1983. Complainant had received invoices from respondent containing those terms for at least the two years preceding the transactions in issue in this proceeding. Therefore, we conclude that it knew of them, and that even though complainant had not signed a document expressly agreeing to these terms, by course of conduct both parties have agreed to them with respect to the settlement of claims. However, other than those contained on the front of the invoices we also conclude that these are the only provisions to which the parties have agreed.

Complainant met both conditions set forth in paragraph 5, above, when it notified respondent of a claim in which it specified the defects in 11 of the 14 transactions within 48 hours of its receipt of the bananas in Cleveland. It also provided respondent with written claims for all 14 transactions in which it set forth the bases thereof along with a statement of losses within 60 days of its receipt of the bananas. In addition, complainant faithfully paid respondent the full amount of the invoices even though it had made the claims. This, of course, gave respondent a powerful tool by which to offer complainant an allowance on its own terms. Respondent also investigated each claim, and offered to make adjustments which it found to be appropriate. However, we do not read the language as to adjustments in paragraph 6 to imply that a receiver of bananas cannot challenge the validity of the allowances. Finally, complainant did not accept the amounts which were tendered as full settlement of the claims.

The above discussion provides the necessary backdrop to discuss respondent's contentions that complainant must accept the amounts tendered to it as full settlement of its 14 claims. Respondent set forth three alternative, but not necessarily mutually exclusive, reasons for its contention that pursuant to the Uniform Commercial Code, hereinafter U.C.C., complainant is precluded from recovering more than it was offered in settlement.[2] It claims that by

[2] All references to the Uniform Commercial Code are to the Ninth Edition, 1978, nerican Law Institute and National Conference of Commissioners On Uniform ate Laws.

virtue of usage of trade (industry practice), course of conduct, or course of performance, the complainant has accepted its methodology of granting allowances based on the f.o.b. price of bananas plus necessary expenses such as transportation and handling when the bananas have condition defects.

Section 1-205(2) of the U.C.C. defines usage of the trade as:

> . . . any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts.

Note 4 to 1-205(2) of the U.C.C. states that usage of trade is "a factor in reaching the commercial meaning of the agreement which the parties have made." It does not "displace or negate 'established rules of law.'" Pursuant to Note 5 a usage of trade need not be "ancient or immemorial." Rather, there must be "regularity of observance." As the proponent of the claim that by usage of the trade settlements for bananas that do not meet contract terms are based on f.o.b. price plus other necessary costs respondent has the burden of proof. *International Produce Distributors, Inc.* v. *A & L Produce Co., Inc.*, 31 Agric. Dec. 356 (1972); *Santelli* v. *Rubinstein*, 21 Agric. Dec. 1053 (1962); *Spada Distributing Co.* v. *Frank Kenworthy Co.*, 17 Agric. Dec. 347 (1958). Based on our analysis of the facts in this case we conclude that respondent has failed to prove that all banana dealers grant allowances for shipments which do not meet contract specifications based on f.o.b. price plus necessary expenses. Respondent provided testimony that it does so. It provided somewhat murky testimony that Castle and Cooke does so. The business of those two companies encompasses about 60 percent of the banana business in the United States. Even construing the testimony in the light most favorable to respondent we cannot conclude that respondent has proved that its allowance procedures with respect to bananas rise to the point where they are customary in the trade. At a very minimum such a conclusion could be drawn only after extensive review of testimony by buyers rather than self-serving statements made by sellers, and the custom would have to be established through numerous cases of actual practice, and not through the opinion of a witness. *Coast Marketing Company* v. *World Wide Produce Company*, 30 Agric. Dec. 1742 (1971); *California Fruit Exchange* v. *Spracale Fruit Co.*, 89 F. Supp 580 (W.D. PA, 1950). Even more important is the fact that respondent failed to provide meaningful explanations as to why it gave allowances in the amounts it did, and in some instances denied them, with re-

spect to the 14 transactions in issue here. It certainly did not prove that the trade grants allowances without giving fuller explanations than were given to complainant as to how the computations were arrived at, or that receivers are denied an opportunity to negotiate final settlements.

Section 1-205(1) of the U.C.C. defines course of dealing as:

> . . . a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

This provision should be read in conjunction with section 2-208(1) of the U.C.C. which provides that:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

The parties dealt with each other on a weekly basis under the common contract provisions written by respondent for two years prior to the 14 transactions which are involved in this proceeding. However, that there were many prior transactions does not indicate that complainant accepted or acquiesced in the claims procedures followed by respondent. The record shows that complainant had an opportunity to object to those procedures on only three occasions prior to March 1983. It filed claims for allowances based on its belief the bananas involved did not meet contract specifications only on those three occasions. Furthermore, for the latter two claims, which arose in November 1982, complainant strongly expressed its dissatisfaction with respondent's settlement procedures in a letter to respondent dated December 29, 1982.[3] Even though it also accepted the settlement of another claim on respondent's terms after it made the 14 claims with which we are concerned, there are not sufficient claims in which complainant accepted re-

[3] Complainant stated:

> "It is with much regret that I return these 2 claim files accepting your ridiculous offer of settlement, and simply because we are closing our books for the fiscal year and I do not have the time, nor the accessability to the necessary records at this time, to be able to photostat the copies of each ticket to prove my loss, though at any other time I guarantee you I would subpoena all your records to make you prove how you arbitrarily amongst yourselves came up with a figure like you did."

spondent's proposed settlement for us to conclude it acquiesced in its methodology. This is particularly true in view of complainant's vociferous opposition to the two November settlements, and the fact it did not accept the proffers on the 14 transactions. Therefore, we conclude that there has not been a course of dealing or performance which gives rise to the conclusion that respondent's claim settlement procedures are acceptable to both parties.

Singer's requested damages in the amount of $66,697.25 in its formal complaint filed on March 15, 1984. In an Order dated September 18, 1984, the Secretary ordered respondent to pay $9,286.00, the amount it admitted it owed complainant. That left for resolution in this proceeding a claim of $57,411.25. However, paragraph 5 of the contract between the parties, as shown on the reverse side of every invoice for each of the 14 transactions provides that "a formal claim . . . must be filed . . . within 60 days after giving . . . notice [of a claim]". Having dealt with respondent for two years, during which period the same contract was always utilized for many transactions, complainant is charged with knowledge of the provision, and with having accepted it terms, thereby giving rise to a course of performance as provided in section 2–208(1) of the U.C.C. Since the last transaction involved in this proceeding occurred on May 31, 1983, more than 60 days elapsed with respect to all of them prior to the filing of the complaint. Therefore, complainant is limited to no more than it claimed in the formal written claims it filed with respondent within 60 days of the receipt of the bananas with respect to each transaction. The total amount of such claims was $35,691.57, less $9,286.00 already paid by respondent, or $26,405.57. The original individual claims, as lumped together by date of discharge of the bananas from each of five ships, appear to have been based on the difference between complainant's total costs, including contract price, fuel surcharge, transportation, temperature recorders and handling, and the total price fetched on resale, as shown by accounts of sale for each transaction. Under these circumstances complainant did not originally claim lost profits, and as discussed previously, cannot do so now.

In view of our findings that bananas are subject to regulation under the P.A.C.A. even though there are no published grade standards with respect to good delivery, and that certain provisions of the U.C.C. which would insulate the parties from coverage under the PACA are not applicable in this instance, it is necessary to de-

termine the extent to which complainant is entitled to damages. Our analysis of Singer's claims follows.[4]

1. Transactions No. 1 through 3—Rio Babahoya; docked at Albany, New York with unloading March 23, 1983.

The Rio Babahoya docked at Albany, New York, and respondent's bananas were unloaded from that vessel on March 23, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $10.00 per carton with respect to each load. One truck carrying 875 cartons of bananas arrived at complainant's place of business March 24, 1983. The other two trucks, one with 870 cartons and the other with 850 cartons of bananas arrived on March 25, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $25,950 for the 2,595 cartons of bananas, respondent invoiced complainant $1,038.00 as a fuel surcharge, $934.20 for handling charges and $45.00 for temperature recorders for two of the three trucks, for a total contract price for the three transactions of $27,967.20. Complainant made timely payment of this amount to respondent. In addition, complainant paid $1,742.31 for freight, bringing its total costs to point of destination to $29,709.51.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Babahoya. The inspection showed that seven percent of the cartons were ripe and turning, thereby constituting a significant condition defect.

When the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent on March 25, 1983, that it believed they were not in accordance with contract specifications. Chiquita responded to the complaint by performing an inspection on March 28, 1983. After that date complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "fruit was showing a chill effect w/out any other characteristics of chill except the grey cast to the peel. All temperatures w/in tolerance." In the remarks section of

[4] Respondent claimed that an adverse inference should be drawn from complainant's failure to provide temperature charts to show the temperatures at which the bananas were maintained after they were unloaded. We decline to do so because for the most part complainant filed prompt complaints with Chiquita, indicating that the problems existed at the time of delivery. While we are tempted to draw adverse inferences from respondent's failure to provide charts showing the temperatures on board the ship even though such charts were requested by Singer's prior to hearing, we shall not do so primarily because the issues can be decided without invoking adverse inferences.

that same form respondent wrote "complaint on discoloration (and after ripening) on arrival. Customer requested our QC inspection". The inspection showed with respect to the load which arrived on March 24, 1983 that 8 percent of the bananas were ripe and turning or ripe. With respect to the truckload containing 850 cartons which arrived on March 25, 1983 it showed 14 percent of the cartons were ripe and turning or ripe. The record does not show a quality control report at destination for the third truckload. However, based on the discharge inspection and the other two inspections at destination we find that the preponderance of the evidence shows it did not make good delivery, particularly since Chiquita granted a $4,000 allowance without distinguishing between the three loads. In addition respondent either did not look for or did not find any underpeel discoloration, which would reflect chill damage.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $7,402.75 for the load which arrived March 24, 1983, and $8,846.00 and $8,056.25 for the other two loads for total sales of $24,305.00. This is $5,404.51 less than its computed costs for the 2,595 cartons of bananas. Complainant claimed $5,766.85 as its total losses on the three loads. The $362.34 difference is unexplained. Respondent offered $4,000.00 in full settlement without giving complainant the benefit of an explanation as to why it was doing so.

We find, based on our review of the evidence with respect to the three truckloads of bananas, that they did not meet contract specifications when they were delivered to complainant. Respondent dealt with the three loads as if they were one unit. It implicitly acknowledged that bananas that were at least 8 percent and as much as 14 percent ripe and turning or ripe at the time of delivery were defective when it granted a $4,000.00 allowance. While it provided a rationale for the amount granted at hearing in the form of a worksheet, this was not a document to which complainant was privy at the time the allowance was granted. Rather, it constituted respondent's unilateral determination as to the amount of the allowance it wanted to grant. The best evidence of the damages suffered by complainant are its three accounts of sale, which reflect the total prices fetched for the three transactions. The difference between its computed costs and the total price fetched on resale is the appropriate measure of damages in this instance. That amount is $5,404.51. We will disallow the additional claim of $362.34 as being unsupported by the evidence. Respondent has previously paid

complainant a $4,000.00 allowance. Therefore, we shall award complainant $1,404.51 with respect to these three claims.

2. Transactions No. 4 through 7—Rio Sulaco; docked at Charleston, South Carolina with unloading March 31, 1983.

The Rio Sulaco docked at Charleston, South Carolina, and respondent's bananas were unloaded from that vessel on March 31, 1983. Four truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $9.00 per carton with respect to each load. Two trucks arrived at complainant's place of business April 2, 1983. One truck carried 850 cartons of bananas, and the other carried 848 cartons. One truck carrying 848 cartons arrived at complainant's place of business on April 4, 1983, and the fourth truck, carrying 850 cartons, arrived on April 5, 1983. All four truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $30,564.00 for the 3,998 cartons of bananas, respondent invoiced complainant $90.00 for four temperature recorders, a fuel surcharge of $1,358.40, and handling charges of $1,154.64 for a total contract price for the four transactions of $33,167.04. Complainant made timely payment of this amount.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Sulaco. The inspection showed scorable defects ranging from 3.4 percent to 4.1 percent depending on the hold from which the bananas were taken. Ripe and turning bananas ranged between 0.8 percent and 1.5 percent of the cartons, which is not a significantly high percentage of defects.

When the bananas had been unloaded into its ripening rooms from the trucks complainant gave oral notice to respondent with respect to the truckloads which arrived on April 2, 1985 that it believed the bananas were not in accordance with contract specifications because they had a grey color, and with respect to the other two truckloads which arrived on April 4, 1983 and April 5, 1983, that they were ripe and turning. Respondent was not able to inspect the bananas immediately. Therefore, complainant kept them in its ripening rooms while it sold other bananas. Respondent performed an inspection on April 13, 1983.

After April 15, 1983, complainant filed its written complaint and statement of damages with respect to the two loads of bananas which arrived on April 2, 1983. It set forth as the basis of its claim that "upon ripening and some on arrival, the fruit was turning a grey color, as if to show chill, without any other characteristics of chill and temperatures within tolerance." In the remarks section of that same form respondent wrote "Soft and breaking fruit on arriv-

al." The destination inspection showed with respect to these two loads that 30 percent of the bananas had underpeel discoloration.

After April 11, 1983 complainant filed its written complaint and statement of damages with respect to the two loads of bananas which arrived on April 4, 1983 and April 5, 1983. It set forth as the basis of its claim that "upon ripening fruit had a grey cast as if to show chill effects without any other characteristics of chilling and temperatures within tolerance." In the remarks section of that same form respondent wrote "ripe & turning". The destination inspection showed with respect to these two loads that 30 percent of the bananas had underpeel discoloration.

Complainant kept careful records of its sales with respect to the four truckloads involved. The accounts of sale showed that the bananas fetched $8,329.50 and $6,919.25 for the first two truckloads, and $6,459.00 and $6,959.50 for the second two loads for total sales of $28,667.25. This is $8,661.18 less than its computed costs for the 3,998 cartons of bananas, which includes $3,483.99 for transportation and $678.40 for handling in addition to the sales price and other fees paid to respondent. Complainant claimed $3,247.25 with respect to the first two transactions, and $4,745.66 with respect to the other two transactions, for a total claim of $7,992.91. Respondent granted no allowance with respect to the first two transactions, and offered $1,365.00 for the other two, leaving $6,627.91 as the total claim for which it did not grant an allowance. Respondent explained to complainant that it declined to grant an allowance for two truckloads, because there was no underpeel discoloration at discharge, and gave less of an allowance than complainant requested on the other two without an explanation.

We find based on our review of the evidence with respect to the four truckloads of bananas that the second two truckloads did not meet contract specifications when they were delivered to complainant. Respondent implicitly acknowledged that there were condition defects warranting the grant of an allowance when it offered complainant $1,365.00. Unfortunately, its reasons are murky, at best. The issue as to whether respondent should have granted more allowances turns on our determination of which party was responsible for the underpeel discoloration on these two loads.

Both parties agree that underpeel discoloration is a serious condition defect. Both parties agree that it arises only as a result of chill damage. It is also the case that underpeel discoloration is sometimes noticeable because the outer skins of the bananas have a dull grey cast to them. However, the best way to tell whether there is underpeel discoloration is to peel back the skin of the

banana and look at its underside. Speckling or spots indicates there is underpeel discoloration.

That underpeel discoloration was not found when the Rio Sulaco was unloaded in Charleston does not mean the chill giving rise to this condition had not yet occurred. The condition does not appear immediately upon chilling the banana. Thre are no temperature records to show the hold temperatures on board ship. These records were requested of but not furnished by respondent.

With respect to the second two truckloads of bananas the pulp temperature when the bananas were unloaded was 58° to 60° fahrenheit. The pulp temperature on arrival of one of the two trucks was 60° to 65° fahrenheit. None was shown for the other truck. Temperature ranges for the two trucks while they were in transit were not provided.

Based on our review of all the evidence we conclude that the second two truckloads of bananas delivered to complainant from the Rio Sulaco did not make good delivery. The pulp temperatures at discharge from the ship were 58° to 60° fahrenheit. The pulp temperatures at the time of arrival of the trucks were at or above those at the time of unloading from the ship. Complainant filed complaints as to the condition of the fruit immediately upon accepting delivery. The inspection was not held until between eight and eleven days after the arrival of the fruit, during which time complainant carefully monitored the ripening process. While it is true the chill could have occurred during this period, we believe it is likely it occurred while the bananas were on the ship because by offering partial reimbursement respondent admitted there were problems with the bananas on arrival in Cleveland, and there was no showing of defects other than underpeel discoloration. Under the circumstances it should have granted a full allowance based on complainant's proved losses. The fact that the inspection was held 8 days after arrival is subsumed by respondent's grant of a partial allowance.

With respect to the two loads which arrived on April 2, 1983, respondent must prevail. The distinction in facts between these two loads and the two on which we have awarded damages is that there is no admission by respondent as to its liability. The inspection by Chiquita for all four loads was so distant in time from the arrival of the trucks at complainant's place of business that we cannot ascribe responsibility for the condition defects found to one party as opposed to the other. Therefore, having accepted the goods by unloading them, complainant had the burden to prove respondent was responsible for the defects. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato*

Co. v. *the Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). It failed to sustain that burden.[5]

We accept complainant's accounts of sale and computations of costs as accurate. Complainant lost $4,745.66 on the two loads for which we are awarding damages. However, since respondent granted an allowance of $1,365.00 for them, we shall award damages of only the difference, or $3,380.66.

3. Transactions No. 8 through 10—Chion Trader; docked at Charleston, South Carolina with unloading April 7, 1983.

The Chion Trader docked at Charleston, South Carolina, and respondent's bananas were unloaded from that vessel on April 7, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $9.50 per carton with respect to each load. One truck carrying 875 cartons arrived at complainant's place of business on April 11, 1983, and two trucks, each carrying 850 cartons, arrived on April 12, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $24,462.50 for the 2,575 cartons of bananas, respondent invoiced complainant $1,030.00 as a fuel surcharge, $875.50 for handling, and $67.50 for temperature recorders, for a total contract price for the three transactions of $26,435.50. Complainant made timely payment of this amount to respondent. In addition, complainant paid $2,771.20 for freight, bringing its total costs to point of destination to $29,206.70.

Respondent followed its usual practice of inspecting the bananas for various defects when they were unloaded from the Chion Trader. Among other findings the inspection showed that 18 percent of the cartons of bananas from hatch 3 showed underpeel discoloration.

When the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent that it believed they were in accordance with contract specifications. Respondent came to complainant's place of business, and performed an inspection on April 13, 1983. At some time after April 12, 1983 complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "upon ripening fruit was showing an off-color cast of grey as if to show chill without any other characteristics of chill and temperatures O.K. on arrival". In the remarks portion of that same form respondent wrote "QC in-

[5] Complainant need not have waited for Chiquita's inspectors to arrive. Federal inspection service is available in Cleveland, Ohio. Complainant was free to secure and rely on the results of such an inspection. It should have done so under these circumstances.

spection after ripening brown discoloration". The inspection showed with respect to two of the three loads that 35 percent (for the load arriving April 11, 1983) and 42 percent (for one of the loads arriving April 12, 1983), of the clusters did not meet specifications. This is very high in both instances. There was no quality control inspection shown for the third load of bananas. The certificates also appear to show that there was considerable underpeel discoloration.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $8,561.00 for the load which arrived on April 11, 1983, and $8,062.00 and $7,748.75 for the loads which arrived on April 12, 1983, for total sales of $24,371.75. This is $4,834.95 less than its computed costs for the 2,575 cartons of bananas. Complainant claimed $4,954.51 as its total losses on the three loads. The $119.56 difference is unexplained. Respondent offered $2,000.00 in full settlement for one of the truckloads containing 850 cartons because the bananas for that load were known to have come from a hold in which excessive underpeel discoloration was found. The record does not reflect which truck was involved. The amount of money, however, most closely approximates the segregated claim by complainant for $1,924.25, and we will ascribe the allowance to that truckload. The inspection report which showed that 35 percent of the clusters did not meet specifications clearly related to the truck which arrived on April 11, 1983 with 875 cartons of bananas.

We find based on our review of the evidence with respect to the three truckloads of bananas that the two loads for which inspections were provided did not meet contract specifications when they were delivered to complainant. The inspections were made either one or two days after the bananas were received and accepted, with percentages and types of defects which were too high to be ascribed to deterioration while in transit and after delivery. With respect to the third load complainant has failed to meet its burden of proof that the bananas did not make good delivery, particularly since respondent treated each truckload separately, and our finding of liability is dependent on the results of inspections. Respondent has made full compensation with respect to one load which did not make good delivery, as discussed above. With respect to the third load involving 875 cartons we find complainant's claimed loss of $1,419.26 to be proved by the evidence, and we shall award complainant that amount.

4. Transactions No. 11 through 13—Rio Babahoya; docked at Albany, New York with unloading May 4, 1983.

The Rio Babahoya docked at Albany, New York, and respondent's bananas were unloaded from that vessel on May 4, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $11.50 per carton with respect to each load. Each truck contained 850 cartons. One truck arrived at complainant's place of business on May 5, 1983, and the other two trucks arrived on May 6, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $29,325.00 for the 2,550 cartons of bananas, respondent invoiced complainant $1,020.00 as a fuel surcharge, and $918.00 for handling, for a total contract price for the three transactions of $31,263.00. Complainant made timely payment of this amount to respondent.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Babahoya. The inspection showed three percent of the cartons from hold number 4, the hold from which Singer's bananas were taken, were ripe and turning, and that overall there were a number of condition defects. The inspection at discharge did not reveal any underpeel discoloration.

After the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent on May 11, 1983, that it believed they did not meet contract specifications because they showed underpeel discoloration and were old. Respondent made an inspection of the three truckloads of bananas on May 13, 1983. On or after that date complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "These loads appeared to be old fruit. Upon arrival showed a slight discoloration, as if they were chilled, but temperatures were within tolerance. Upon ripening showed excessive discoloration and scarring with deep bruises—crown mold and occasional rot." Respondent did not enter comments in the "remarks" section of the complaint form.

The inspection showed "fruit appears fairly decent at end but after processing too many show poor color but most not from chilling", and "100 boxes examined—sample divided between 3 rooms of the 3 loads all gassed—avg color of all clusters 3—3½ OC—scattered throughout—34% med/sev—5%—off color from chilling 15%—Med/sev. 4%. Mostly large full mature fruit, 5% of boxes clusters showing ugly brownish outer peel discoloration and excessive amounts of CM/CR—NI/NR very mixed appearance, poor to

fair." [6] The bananas were obviously not in good condition on May 13, 1983.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $8,343.75, $7,086.00, and $7,061.50, for total sales of $22,491.25. This is $10,563.20 less than its computed costs for the 2,550 cartons of bananas, which is comprised of the $31,263.00 invoiced by respondent and $1,791.45 for hauling, or a total of $33,054.45. Complainant originally claimed $10,608.20 as its total losses on the three loads. The $45.00 differential is probably a deduction for unloading one of the trucks. Respondent declined to grant any allowance on the three loads on the grounds that:

> Discharge reports do not show any evidence of underpeel discoloration at discharge. Further, boxing dates indicate no excessive age of fruit at loading or at discharge.
>
> Although our Quality Control inspector did find off-color fruit at your location on May 13, 1983, it is our contention that the fruit was damaged by improper conditions during transit or ripening. To further support this, the carrier report on Lot 440 indicates that the load arrived in Cleveland on May 5, "but could not deliver due to cooler problems."

We find based on our review of the evidence with respect to the three truckloads of bananas that complainant did not prove they did not meet contract specifications when they were delivered to it. It did not file a claim within 48 hours of accepting the bananas, as required by the contract, which defense was not raised by respondent, but which is recognized here. Additionally, the record shows that the bananas were on board the Rio Babahoya for about 12 days, which is a long time. The pulp temperatures of the bananas were 57§ to 60° Fahrenheit when they were unloaded from the ship. On arrival at Singer's in Cleveland the pulp temperatures were 57° to 60°, 59° to 60°, and 62° to 65°, respectively. All these temperatures are all right, although those for the latter truck are somewhat high. Of great importance is the fact that respondent found a low percentage of ripe and turning and no underpeel discoloration at the time the bananas were unloaded from the ship, even though they had been in transit a long time. Furthermore, complainant did not file an oral complaint with respondent until May 11, 1983, six days after the first load had arrived, and five

[6] CM is not defined in the record. OC means off color. CR means crown rot, NI means neck injury, and NR means neck rot.

days after the other two arrived. The bananas were admittedly old when they were inspected. Some were off color, with 15 percent of them experiencing underpeel discoloration. Another five percent of the fruit had other condition defects. Unfortunately for Singer's, having accepted the bananas it has the burden to show that they did not make good delivery. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato Co.* v. *The Kaufman Brown Potato Company*, 16 Agric. Dec. 1055 (1957). In this instance it did not provide enough evidence for us to conclude such was the case. We are particularly impressed by its failures to complain about the condition of the bananas when it received them or to provide temperature charts for the inland transit and the seven and eight day periods between the arrival of the fruit and when it was inspected. These charts were critical to its proof in this instance because the percent of defects of various kinds cannot be said to be of such a nature and amount that they could occur only prior to unloading from the ship, and not after arrival at complainant's place of business.

5. Transaction No. 14—Olancho; docked at Albany, New York with unloading May 27, 1983.

The Olancho docked at Albany, New York, and respondent's bananas were unloaded from that vessel on May 27, 1983. One truckload of bananas was sold to complainant, f.o.b. port of discharge. The sale price was $10.00 per carton for 850 cartons or $8,500.00, plus charges for a fuel surcharge, handling and a temperature recorder of $678.00, for a total cost of $9,178.00. The truck arrived at complainant's place of business on May 31, 1983, and was received, unloaded and accepted. Complainant immediately complained to respondent about the condition of the bananas. Subsequently, complainant made timely payment in full.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Olancho. It showed that 90 percent of the clusters met specifications.

After the bananas had been unloaded into its ripening rooms from the truck complainant immediately gave oral notice to respondent that it believed they did not meet contract specifications because they were old, had mold, were ripe and turning, were scarred, and were short. It filed its formal written complaint and statement of damages on July 20, 1983. It set forth as the basis of its claim that "This load was absolute *garbage*. The *WORST* load of bananas I ever received since entering the banana business."

Respondent inspected the bananas on June 1, 1983. The inspection showed that only 45 percent of the clusters of bananas met specifications. The report stated in pertinent part:

> R & T 4%, 1 Cluster in each of 2 boxes color 6+, balance of all clusters 2-2½, fruit breaking (Not gassed)—(5 boxes examined for PCMS—Score 45 Heavy SR 50%—Very large full mature fruit, very long fingers (difficult to pack)—about 5% C.M.—overall poor appearing quality, dull color and dirty appearance.

The bananas were obviously not in good condition on June 1, 1983, only four days after they were unloaded from the Olancho. Based on respondent's own inspection report we have no choice other than to conclude that the bananas did not make good delivery, particularly since the in-transit temperatures from dock to Singer's place of business were in the acceptable range, 58° to 64°, with the high temperatures occurring only for a short period.

Complainant kept careful records of its sales with respect to the truckload of bananas. The account of sales showed that the bananas fetched $3,424.50 on resale. This is $5,753.50 less than its computed costs of $9,178.00. Complainant originally claimed $6,369.10 as its total losses. Respondent granted an allowance of $1,921.00 without giving any explanation as to its reasons for doing so. Respondent is liable for the differential of $4,448.10.

In summary we have found that respondent has failed to grant allowances to complainant in the following amounts:

1.		
2.	Transactions 1-3	$1,404.51
3.	Transactions 4-7	3,380.66
4.	Transactions 8-10	1,419.26
5.	Transactions 11-13	0.00
	Transaction 14	4,448.10
	Total	$10,652.53

Its failure to pay complainant $10,652.53 in 11 transactions constitutes violations of section 2 of the PACA for which reparation should be awarded with interest.

As the prevailing party complainant is entitled to reasonable attorney's fees and expenses. *Bill Offutt, Inc.* v. *Marvin E. Berry*, 37 Agric. Dec. 1218, 1225 (1978). It filed a timely request for reimbursement, and respondent did not file any objection to the claim. The total amount requested by complainant was $6,482.10, which included $4,375 for attorney's fees. We find the claim appropriate.

Therefore, complainant should be awarded $6,482.10 for fees and expenses.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $6,204.43, with interest thereon at the rate of 13% per annum May 1, 1983 until paid.

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $4,448.10, with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

Within 30 days from the date of this order respondent shall pay fees and expenses to the complainant, as reparation, in the amount of $6,482.10, with interest thereon at the rate of 13% per annum from the date of this order until paid.

Copies of this order shall be served upon the parties.

BARTON WILLOUGHBY d/b/a WILLOUGHBY FARMS, *v.* FRITO-LAY, INC., PACA Docket No. 2-6614. Decided May 1, 1986.

Agreement to grow potatoes—statute of frauds—oral modification of written contract—agency—apparent authority—estoppel—reparation awarded.

Where employees of respondent dealt exclusively with complainant regarding his crop of potatoes, and in doing so induced him to delay delivery beyond dates provided in written contract, the respondent is held to have given such agents apparent authority to modify the contract on its behalf. It is held that an oral modification of a written contract does not violate the statute of frauds. Further, having relied to his detriment on the promises of respondent's agents, complainant may claim that respondent is estopped to deny that the contract was modified.

Dennis Becker, Presiding Officer.
Stephen P. McCarron, Esquire, Silver Spring, MD, for complainant.
Joseph Nealon, Esquire, Washington, DC, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $84,825.83 in connection with a transaction involving the sale and shipment of chipping potatoes in interstate commerce. Respondent filed a counterclaim in which it seeks a refund of an alleged overpayment for the potatoes it bought from complainant in the amount $1,790.15.

A copy of the formal report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Since the amount claimed in the complaint exceeds $15,000.00, and respondent requested an oral hearing, such oral hearing was held in Washington, D. C., on April 16 and 17, 1984. One witness testified on behalf of complainant, and two witnesses testified on behalf of respondent at the hearing. In addition, several depositions were placed in evidence by the parties. Complainant amended its complaint after evidence had been taken, as a result of which the hearing was held open for a period of ninety days to enable respondent to determine whether it wished to offer other evidence. Respondent determined it did wish to do so, and the oral hearing was concluded on September 19, 1985. Subsequent to the hearing both parties filed briefs and claims for fees and expenses. Complainant filed an objection to respondent's request for fees and expenses.

FINDINGS OF FACT

1. Complainant, Barton Willoughby, (hereinafter either "Mr. Willoughby" or "complainant") is an individual doing business as Willoughby Farms, with an address at P.O. Box 117, Gordon, Alabama. As a producer he was not subject to license under the Act during the period in issue in this proceeding.

2. Respondent, Frito-Lay, Inc., (hereinafter either "Frito-Lay" or "respondent"), is a corporation with an address at P.O. Box 35034, Dallas, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. In 1982 complainant and respondent initiated talks with respect to whether complainant would grow chipping potatoes for resale and delivery to respondent. As a result of those discussions a written contract was entered between complainant and respondent on January 24, 1983, under which complainant was to grow for sale to respondent 25,000 hundredweight of chipping potatoes at a price of $5.50 per hundredweight, f.o.b., U.S. Commercial, 90 percent U.S. No. 1, and which were to be size "A". 8,000 hundredweight were to be delivered to respondent during the week of June 13, 1983, 8,000 hundredweight were to be delivered to respondent during the week of June 20, 1983, and 9,000 hundredweight were to be delivered to respondent during the week of June 27, 1983. The contract further provided in pertinent part that:

"All potatoes shipped under this contract guaranteed to chip to Frito-Lay's satisfaction upon arrival. Frito-Lay reserves the option of not accepting deliveries which do not meet the above shipping schedules.

* * * * * * *

Purchaser may at any time return to seller at seller's expense any portion of goods listed herein, when in the opinion of purchaser in its sole discretion such goods do not chip to its satisfaction and purchaser, at its election, shall be entitled to receive from seller for such returned goods full credit therefor or replacement thereof with goods that do chip to purchaser's satisfaction. Seller guarantees proper loading according to carriers' tariff specifications and guarantees lowest through rate.

Seller's obligations hereunder shall not be mitigated or reduced in any way by virtue of seller's having obtained or purchased seed potatoes from purchaser to produce the potatoes to be shipped hereunder."

4. In late February and early March 1983 complainant bought sufficient quantities of seed potatoes from respondent to enable it to plant 103 acres of its fields with potatoes so as to be able to make delivery to respondent of 25,000 hundredweight in accordance with the contract terms set forth in paragraph 3, above. The seed potatoes were known as FL-162 Potatoes, which is a special type of potato developed by respondent because it chips well. In entering into the contracts for the purchase of such seed potatoes, complainant agreed that "the potatoes produced from the above seed cannot be sold or disposed of without the expressed permission (documented) by Frito-Lay, Inc." The contracts also provided that "Confirmation contingent upon grower having a 1983 Frito-Lay chip contract. . . ."

5. Respondent received two shipments of seed potatoes on February 26, 1983, and either February 28, 1983, or March 1, 1983, respectively. It is not known when other shipments of seed potatoes were received by complainant. Complainant let such potatoes lie for about two weeks so as to prepare them for planting. Some of the FL-162 seed potatoes had been planted by March 15, 1983.

6. Respondent eventually planted 103 acres of FL-162 seed potatoes. Complainant anticipated that it would harvest a yield of about 250 hundredweight of potatoes per acre. It takes between ninety and 110 days to grow FL-162 potatoes to a maturity at

which they are size "A", which size is 1 and 7/8 inches in diameter or larger.

7. Harold Willingham was the regional representative of respondent. He was the primary individual during the period March through July 1983 with whom complainant dealt insofar as the contract was concerned. Complainant also dealt with Michael Anderson, a subordinate employee to Mr. Willingham, during a portion of the months of June and July 1983 because Mr. Willingham was on vacation. Mr. Anderson acted as Mr. Willingham's substitute during that period. Both Mr. Willingham and Mr. Anderson had authority to deal directly with complainant, although to an undetermined extent they in turn were supervised by their home office in Dallas, Texas. By virtue of their actions in dealing with Mr. Willoughby, he properly relied upon their representations as being binding upon respondent.

8. During the week of June 13, 1983, complainant and Harold Willingham discussed the contractual agreement under which complainant was to deliver 8,000 hundredweight of potatoes to respondent. Complainant stated that his potatoes could use more sizing because they were late in maturing, and that not more than 75 percent of them were size "A". He felt that if he waited until later in the month he would have a higher percentage of size "A" potatoes. Complainant could have delivered 8,000 hundredweight of potatoes during the week of June 13, 1983, had it been necessary for him to do so. However, in doing so he would have seriouly jeopardized his ability to deliver the remaining 17,000 hundredweight of potatoes in the ensuing two weeks because he would have had to dig too many acres of potatoes to make the total 8,000 hundredweight. Respondent, through Mr. Willingham, expressed its willingness to delay taking delivery of the potatoes because the crop in that area of the South was late in maturing due to weather conditions, and other plantings in which Frito-Lay had an interest needed to be harvested first. In particular, respondent had not taken delivery of a large quantity of potatoes from Baldwin County, Alabama. Those potatoes were grown in accordance with joint ventures between respondent and various farmers whereby both respondent and the farmers split the costs and profits. This business arrangement had been going on for several years prior to 1983. The parties mutually assented to a delay in delivery of the potatoes.

9. During the week of June 20, 1983, complainant and either Mr. Willingham or Mr. Anderson again discussed delivery of potatoes by complainant to respondent under the contract. Respondent's agent told Mr. Willoughby that respondent did not wish to take his potatoes during that week because there had been a further delay

in the harvest of the potatoes in Baldwin County, Alabama, and respondent wished to clear out those potatoes first. Mr. Willoughby indicated that he was able to deliver 8,000 hundredweight of potatoes during the week of June 20, but agreed to delay delivery for the benefit of both parties because he knew that his potatoes could size up better if there were a delay. Respondent's agent assured him that Frito-Lay was interested in taking all of his potatoes.

10. Mr. Willingham went on vacation after the week of June 20, 1983, and Mr. Michael Anderson substituted for him during the time he was on vacation. During the week of June 27, 1983, complainant was willing to deliver as many potatoes as respondent would take. However, on Monday, June 27, 1983, in a discussion with Mr. Anderson in which he and Mr. Anderson discussed the status of complainant's crop, he expressed a willingness to delay harvest. This was done primarily for the benefit of respondent, although there was some benefit to complainant because the potatoes would grow a little more. Mr. Willoughby acceded to Frito-Lay's desires more than he sought the delay in the harvest. On June 29, 1983, however, Mr. Willoughby asked Mr. Anderson to send him purchase orders so that he could dig the potatoes and deliver them to respondent. Mr. Anderson said he would try to get purchase orders. Mr. Anderson was not able to do so after checking with Dallas, Texas, except for one order, and he and Mr. Willoughby agreed that the first load of potatoes should be dug on Thursday, June 30, 1983. Mr. Anderson provided a purchase order for this purpose. The potatoes were dug, delivered to respondent, received, and accepted. However, no other purchase orders were provided to complainant during that week.

11. It is the practice of Frito-Lay in Alabama that potatoes for which it has contracted should not be dug unless a purchase order is first provided to the farmer. This is necessary because potatoes in that region do not store well once they have been dug. Complainant knew that this was the practice of respondent even though he had never farmed potatoes previously. It was also the practice of respondent to work with a farmer with which it had contracted to assure that the potatoes which he had planted under contract were bought by Frito-Lay. It was not unusual for Frito-Lay to delay taking the potatoes from a specific farmer because of its own particular needs insofar as production of potato chips is concerned. Respondent was able to control its receipt of potatoes through use of the purchase order. Unless a farmer received a purchase order for a truckload of potatoes the farmer was not in a position to deliver them to respondent. Complainant was aware of the practice of Frito-Lay to delay receipt of potatoes which it had con-

tracted for, and was willing to deal with the respondent on the verbal understandings that eventually respondent would accept his potatoes. During the week of June 27, 1983, complainant was ready and able to deliver all the potatoes to respondent. He was diligent in his request for the provision of purchase orders during that week. He was willing, however, because of the practice of Frito-Lay to extend the period of a contract, to wait to deliver them. Effectively, complainant was precluded from digging potatoes during the week of June 27, 1983, with the exception of the one load which was dug, by the actions of respondent in requesting him to delay, and because respondent did not provide him with purchase orders.

12. July 4, 1983, fell on a Monday. On July 5, 1983, Michael Anderson visited complainant at his farm to talk to him about his crop. Complainant was insistent on that date that respondent allow him to dig his potatoes and deliver them to the respondent because they were beginning to deteriorate in the field. Mr. Anderson told Mr. Willoughby that the Baldwin County potatoes had to be cleared out first, and that his potatoes would be next. Because the FL-162 variety of potato was protected by Frito-Lay, and could be delivered only to Frito-Lay unless respondent released them for delivery to someone else, complainant was in no position to dig the potatoes, or to sell them to anyone else.

13. During the week of July 5, 1983, respondent gave complainant six purchase orders. However, during this week it declined to deal with complainant to any further extent because it was clearing out the Baldwin County potatoes. Mr. Willingham had returned from vacation, and he promised Mr. Willoughby that once the Baldwin County potatoes were cleared out the complainant would be next to receive purchase orders. However, this did not occur. Mr. Willoughby discovered on or about July 11, 1983, that Mr. Willingham and Mr. Anderson went to Sand Mountain, Alabama, which is in the Northerly portion of the state, and began to place purchase orders there for delivery of potatoes to respondent. Effectively, complainant had been by-passed. Complainant knew that his potatoes were beginning to melt in the ground, and otherwise deteriorate. Whereas at one point he could have harvested as much as 250 hundredweight of potatoes per acre, his yield began to drop radically in the second week of July. Complainant demanded that his potatoes be harvested. During June and July 1983 he would have been able to load six trucks a day, with each load containing 450 or more hundredweight of potatoes. When he discovered that the Sand Mountain potatoes were being harvested before his he grew angry. He took what action he could to harvest and

sell his potatoes. He sold some of the potatoes to other purchasers even though Frito-Lay had not released them for such sale.

14. Complainant delivered 18 loads of potatoes to respondent in June and July 1983, which comprised 8,588.64 hundredweight. 1,907.04 hundredweight of the potatoes delivered to respondent were rejected because they were not of satisfactory chipping quality, or otherwise did not meet respondent's needs. Complainant received net $35,508.97 for the 6,681.60 hundredweight of potatoes which were accepted, after deduction by respondent of $2,585.80 for its costs attendant on three of the four loads of potatoes which it rejected. Complainant also sold 3,329.93 hundredweight of potatoes to other purchasers in an effort to mitigate his damages. He received $14,580.00 for these potatoes. On July 18, 1983, respondent told complainant that his potatoes did not meet respondent's needs, and that complainant was free to dispose of them as he pleased.

15. With respect to the potatoes which complainant sold to respondent, respondent paid complainant $5.75 per hundredweight rather than the $5.50 per hundredweight called for in the contract signed on January 24, 1983.

16. The formal complaint in this matter was filed on March 6, 1984, which was within nine months from the time the cause of action herein accrued.

DISCUSSION

The most serious legal question presented by this case is whether a written contract between the parties may be varied by conduct on the part of the parties, or whether it must be strictly construed in such a manner that none of its provisions may be altered. There is a secondary question as to whether there was a separate contract entered between the parties under which respondent agreed to purchase and accept all of the potatoes grown by the complainant. Based upon the facts in this case, and our analysis of the applicable law, we conclude that the contract need not be strictly construed, but can be varied by the conduct of the parties. Therefore, we do not need to reach the secondary question.[1]

On January 24, 1983, complainant and respondent entered a contract under which complainant was to grow, sell, and deliver to respondent 25,000 hundredweight of chipping potatoes, which deliv-

[1] If we were to consider this issue we would find that there was not a new contract because all of the essential elements of such contract must be clear, and they were not. *Peters & Garabedian* v. *Coyner-Evans Co., Inc., et al.*, 28 Agric. Dec. 752 (1969). There is lacking in any verbal agreement between the parties after June 30, 1983, certain required terms such as the price of the potatoes, the time for delivery, and the place for delivery.

ery was to be over a three week period, with 8,000 hundredweight delivered during the week of June 13, 1983, 8,000 hundredweight delivered during the week of June 20, 1983, and 9,000 hundredweight delivered during the week of June 27, 1983. The contract also provided that the potatoes were to be U.S. Commercial 90 percent U.S. No. 1, size "A", chipping potatoes. They were to be delivered free on board the Willoughby farm in bulk. They were to be shipped to "Any receiving location designated by Area Potato Buyer." Furthermore it was provided that "All potatoes shipped under this contract guaranteed to chip to Frito-Lay's satisfaction upon arrival. Frito-Lay reserves the option of not accepting the deliveries which do not meet the above shipping schedules." Finally, it was provided that "Seller's obligations hereunder shall not be mitigated or reduced in any way by virtue of seller's having obtained or purchased seed potatoes from purchaser to produce the potatoes to be shipped hereunder." The contract was signed by Barton Willoughby on behalf of complainant and by Arthur Goldstein on behalf of respondent. Arthur Goldstein was located in Dallas, Texas.

As a direct result of entering the above contract for growing and selling potatoes, complainant entered four individual contracts for the purchase of seed potatoes from respondent. It did this because respondent had developed a brand of potatoes known as FL-162 which is a good chipping potato. The contracts provided, inter alia, that "the potatoes produced from the above seed cannot be sold or disposed of without the expressed permission (documented) by Frito-Lay, Inc." They further reflected that "Confirmation contingent upon grower having a 1983 Frito-Lay chip contract. . . ." The testimony reflects, and it is obvious by virtue of the above quoted provisions, that complainant would not have bought the seed potatoes unless their purchase was directly connected with the growth and sale of the 25,000 hundredweight of potatoes in the contract entered on January 24, 1983. It is also clear that both the January 24, 1983, contract to grow and sell potatoes and the purchase agreements with respect to the seed potatoes are contracts that are very favorable to Frito-Lay. Effectively, the seed potato contracts preclude the sale of potatoes grown therefrom to entities other than respondent, except with respondent's permission. The purchase and sale contract voids any obligation on the part of Frito-Lay which might arise as a result of the use of FL-162 seed potatoes by complainant. Furthermore, it gives respondent the option in its sole discretion to refuse to accept any potatoes which do not chip to its satisfaction. It allows Frito-Lay to reject the delivery of those potatoes which do not meet the shipping schedules set forth in the writ-

ten contract. The seed potato contracts permit respondent to decline to deliver seed potatoes if complainant has not entered a growing contract with Frito-Lay. In short, the seed contracts and growing contract, when read together, tied complainant in knots. Furthermore, because of the cross references contained in the growing contract and seed contracts, we find that the contracts are interrelated, and were entered by both parties in contemplation of an exclusive means by which respondent could assure itself of a supply of chipping potatoes. We reject any claim by respondent that the seed potato contracts are not related to the growing contract.

A contract is not a one sided agreement. Rather, it is an agreement between two (or more) parties under which each party agrees to assume certain responsibilities in return for consideration from the other party. Just as complainant had a duty to deliver potatoes to respondent, respondent had a duty to take them. Frito-Lay would place an added burden on complainant that he demand respondent accept delivery or subject himself to a finding he breached the contract rather than place an equal duty on itself to request delivery. Such a result would mean Frito-Lay could not breach the contract unless such demand was made. We cannot subscribe to such a result since it would be one-sided and further enhance respondent's already very favorable position, and in any event is illogical.

Complainant testified that he could have delivered 8,000 hundredweight of potatoes during the week of June 13, 1983, had it been necessary for him to do so, but that it was in his self interest not to because only about 75 percent of the potatoes lying in the field were size "A", as a result of which he would have had to dig too many acres to be able to deliver all 25,000 hundredweight as provided for in the contract, having only planted about 103 acres of potatoes, and having expected a yield of about 250 hundredweight of potatoes per acre. Therefore, he acknowledged that he agreed to withhold delivery of potatoes during the week of June 13, 1983. Complainant also acknowledged that during the week of June 20, 1983, he agreed to withhold delivery of 8,000 hundredweight of potatoes because, while he could have delivered them, his field could still size a little more. The willingness of complainant in both of these weeks to withhold delivery of potatoes to respondent was based upon conversations with respondent's representative. We find complainant's version of what happened to be totally credible. Mr. Willoughby was a most forthright, earnest, and honest witness. He would not have agreed to delay delivery of the potatoes on the dates specified by the contract unless he had received assurances

from respondent's agent that Frito-Lay was going to take the potatoes he had in the field. Mr. Willoughby is an experienced farmer with about 2,000 acres of farmland in production. He knows that crops in the field are perishable, and must be harvested in a timely fashion. He was bound by the seed contract not to sell the potatoes he grew to any party other than Frito-Lay.[2] Frito-Lay was obviously willing to delay receiving potatoes from complainant. We find that Mr. Willoughby's version of his conversations with Mr. Willingham is accurate. Among other things it reflects that respondent continually expressed a need to clear out potatoes from Baldwin County before dealing with complainant. Therefore, it is only logical to conclude that Mr. Willoughby acted upon the representations, as he suggested, of respondent's agent that Frito-Lay wanted to delay taking his potatoes.

Frito-Lay has claimed in this proceeding that Mr. Willoughby somehow acted improperly because he did not demand to deliver his potatoes to respondent on the contract dates. Respondent would put all burdens on complainant to assure that delivery occurred. We cannot draw a conclusion that this is a proper interpretation of the contract. As discussed above Frito-Lay has an equal responsibility to demand that complainant deliver potatoes in accordance with the contract terms. Indeed, had complainant not been able to deliver, Frito-Lay could have claimed damages. Therefore, we conclude the parties verbally agreed to a modification of the contract in both the weeks of June 13, 1983 and June 20, 1983, under which complainant, and respondent agreed to delay delivery of potatoes to a later date. The remaining question for resolution with respect to the 16,000 hundredweight of potatoes involved in the weeks of June 13, 1983, and June 20, 1983, is whether respondent's agent had authority to modify the contract, or whether the contract could not be modified because of the statute of frauds. This will be discussed subsequently.

The occurrences during the week of June 27, 1983, are even easier to resolve. By this time complainant's field effectively had sized to the maximum that it could. Mr. Willingham was on vacation during the week commencing on Monday, June 27, 1983. Therefore, Mr. Willoughby had to deal with Mr. Michael Anderson, Mr. Willingham's subordinate. The testimony shows conclusively that Mr. Willoughby was able to deliver the potatoes during the week of June 27, 1983, but that he knew they could probably size a

[2] Mr. Willoughby's integrity is manifested by the fact he did not sell potatoes to any other party until he had to on July 14, 1983, because they were deteriorating in the field. Such action was appropriate [illegible] late damages.

little bit more. It is clear based upon the testimony in this case that it was more at the behest of Frito-Lay that on June 27, 1983, Mr. Willoughby acceded to Frito-Lay's desire to delay delivery of the potatoes. In effect, it was the respondent which did not meet the contract terms insofar as delivery dates are concerned. Mr. Michael Anderson testified that Mr. Willoughby indicated he was not yet ready to harvest the potatoes. We do not find Mr. Anderson's testimony in this regard to be credible.[3] Mr. Anderson, either constructively or actually, convinced complainant that it was all right to wait for a while longer before his potatoes were delivered to respondent. He reiterated what Mr. Willingham had said about the need to clear out the Baldwin County potatoes before taking Mr. Willoughby's crop. Our conclusion in this regard is supported, moreover, because in actuality purchase orders for Monday and Tuesday of a given week are issued on Thursday or Friday of the preceding week. There is no showing that Mr. Willoughby knew this. Mr. Willingham and Mr. Anderson did. In fact on June 27, Frito-Lay had no purchase orders to give for the early part of the week, at least.

Two days later, however, Mr. Willoughby decided that he could not wait any longer because his potatoes were fully mature, and there was a danger they would begin to deteriorate if left in the field. Therefore, on June 29, 1983, he contacted Mr. Anderson and requested that he be allowed to dig his crop. Mr. Anderson attempted to put him off, saying that he did not know if he could get purchase orders. Obviously, Frito-Lay was in the position of denying to Mr. Willoughby the opportunity to harvest his crop by not providing purchase orders. Mr. Anderson eventually offered to provide several purchase orders to Mr. Willoughby for the week of June 27, beginning with June 30. Mr. Anderson, however, was only able to deliver one purchase order, and withdrew his promise to deliver more than that. He then convinced Mr. Willoughby that that one purchase order would be for a load of potatoes which would be used as the test load for the delivery of the rest of Mr. Willoughby's potatoes. Mr. Willoughby, lacking the ability to do other-

[3] We do not find Mr. Anderson's testimony, in general, to be particularly credible. There was a tendency throughout his testimony on the witness stand for Mr. Anderson to remember those points which were favorable to respondent, but to have a memory lapse when his testimony might be favorable to complainant. In addition, his testimony with respect to the July 5, 1983, visit that he made to Mr. Willoughby's farm is in direct contravention of what was happening during that period of time. To say that he was merely making a courtesy visit when Mr. Willoughby was demanding that he be given an opportunity to dig his potatoes is not credible testimony.

wise, acceded to Mr. Anderson's representations in this regard. He delivered a load of potatoes which apparently were of very good chipping quality. Complainant was not provided purchase orders so as to be able to dig any more potatoes until after the end of June, 1983.

On Tuesday, July 5, 1983, while Mr. Willoughby was working in the field, Mr. Anderson paid what he called a courtesy visit. We find that such visit was not a courtesy visit. Rather, it was visit predicated upon the fact that Mr. Willoughby was strongly asserting his need to dig his potatoes, and respondent, acting in a businesslike fashion, was checking out the situation with respect to Mr. Willoughby's crop. On July 5, 1983, Mr. Anderson told Mr. Willoughby again that the Baldwin County crop was late, was not in as good condition as were Mr. Willoughby's potatoes, and had to be harvested first. Mr. Willoughby said he was ready to dig then. Mr. Anderson at least implied that his crop would be next, that all Mr. Willoughby had to do was to be patient. Further, the clear implication of Mr. Anderson's visit is that respondent did not consider its contract with complainant to have ended. Rather, the visit is consistent with Mr. Willoughby's claim the contract had been modified to carry over into July. Otherwise, respondent would have released Mr. Willoughby to sell to other buyers. It is totally inconsistent for respondent to claim the contract had ended, but not to have released Mr. Willoughby to sell the potatoes elsewhere.

As a result of Mr. Anderson's visit however, respondent did give Mr. Willoughby a series of purchase orders. Respondent gave complainant 12 purchase orders beginning with July 5, 1983, and ending on July 13, 1983, in which potatoes were delivered by complainant to respondent. All those potatoes were accepted. There was one purchase order on July 5, one on July 6, two purchase orders on July 7, one on July 8, one on July 11, three on July 12, and three on July 13, 1983. During this period of time Mr. Willoughby was insisting that he needed more purchase orders. He made it clear that he could dig six loads of chipping potatoes a day, each load approximating 450 hundredweight. In the meantime, because Frito-Lay was not giving him more purchase orders, and recognizing what was happening to his potatoes in the field, Mr. Willoughby began to look for other purchasers, despite the fact that the seed potato contracts would not allow him to sell such potatoes to others unless he were released from their prohibitory provisions. On July 14, 1983, he sold a load to a company known as Mid-State. On July 16, 1983, complainant got four more purchase orders, and four loads were delivered to Frito-Lay. Three of those loads were rejected because they could not meet Frito-Lay's requirements. On

July 18, 1983, Frito-Lay took one last load from complainant, which load was rejected by respondent. On that same day Frito-Lay finally allowed Mr. Willoughby to sell his potatoes to other buyers. The load shipped to Frito-Lay on July 18 was resold to a third party. Complainant sought to mitigate his damages by the sale of eight more loads between July 18 and July 21, 1983. Two of these loads were rejected by the purchaser. After that period of time the crop was allowed to rot in the field because the potatoes had deteriorated too much to warrant harvesting.

Frito-Lay did not immediately begin to take complainant's potatoes after it finished digging in Baldwin County. Rather, Mr. Willoughby determined on or about July 11, 1983, that Mr. Willingham and Mr. Anderson had by-passed him and gone to Sand Mountain, Alabama, in the Northern part of the state. At that point he was fully aware that his potatoes were beginning to deteriorate, and that his yield per acre was going down rapidly. Respondent did not keep the promises made by its agents that it would take complainant's potatoes after the Baldwin County crop was cleared out.

Complainant did everything he could to mitigate his damages. Complainant acted responsibly during the entire contract period in his dealing with respondent. His actions in not delivering potatoes during the weeks of June 20, 1983 and June 27, 1983 were taken in reliance on representations made by the agents of respondent. He relied to his detriment on their representations that respondent wanted all of his crop, and that he would be next to receive purchase orders after the Baldwin County potatoes were harvested.

In view of the above the first question which must be resolved is whether Mr. Willingham and Mr. Anderson had actual or apparent authority to bind respondent. Frito-Lay claims it had given them no authority, actual or apparent, to bind it. While we believe that they had actual authority to do so, we need not reach that issue because we find, based upon the facts of this case, that they had apparent authority to do so, which is all that is required. Case law is abundant that when the agent of a principal has apparent authority to act on behalf of that principal, the other party to a contract has a right to rely upon such apparent authority in making his business decisions. *George Arakelian Farms, Inc.* v. *Leonard O'Day Company, et al.*, 31 Agric. Dec. 1395 (1972), and cases cited therein. We have previously held that when a business permits a field representative, who is the only person with whom the other party to the contract can deal, to appear as its agent, and such person makes representations, such representative has apparent authority, and his principal is bound by his actions. *A Levy and J.*

Zentner Co. v. *American National Growers,* 19 Agric. Dec. 1022 (1960); *Goldston* v. *Murlas Bros.,* 21 Agric. Dec. 542 (1962).[4] This is especially necessary when we are dealing with a perishable product because otherwise the other party to the contract cannot hope to recover his losses when promises are not kept. He does not have a product which can be sold to some third party at a later time.

We are drawn to the conclusion that Mr. Willingham and Mr. Anderson had at least apparent authority to bind Frito-Lay because of the way in which respondent operated. While the growing contract between Frito-Lay and Mr. Willoughby was signed by a Frito-Lay representative located in Dallas, all subsequent contacts between complainant and respondent were between Mr. Willoughby and either Mr. Willingham or Mr. Anderson. It is clear that respondent expected complainant to deal with those individuals. For respondent to argue that complainant could have got in touch with somebody in Dallas constitutes a denial of the way in which it was conducting its business operation. Frito-Lay further maintained control of its potato purchasing operation by providing purchase orders for four plants in the Southeast region of the United States out of its Dallas, Texas office. Mr. Willingham, and at times Mr. Anderson, had to get such purchase orders from Dallas, and give them to farmers who were under contract to sell potatoes to respondent. They clearly had input into who received the purchase orders, both by their own admission, and because out of necessity they were the only individuals with whom the farmers were dealing directly. The farmer was kept in the dark as to what was going on. Indeed, Mr. Anderson, in one of his more forthright statements, acknowledged that it was a practice of Frito-Lay not to tell the farmer any more then it had to. A farmer could not deliver potatoes to Frito-Lay unless he got a purchase order. That put the farmer into a subservient position in which he had to try to please the representatives of Frito-Lay in order to get what he was entitled to as of a date certain by virtue of the provisions of the contract. It is no wonder that Mr. Willoughby was willing to put off the harvest of his potatoes. Frito-Lay had him in a bind. For this reason, unless, as discussed below, the statute of frauds precludes changes in the contract dates by either Mr. Willingham or Mr. Anderson, we must find Frito-Lay breached its contract.

[4] We also find for complainant on the basis of estoppel. *Tri-State Sales Agency* v. *Palmetto Fruit & Produce Co.,* 14 Agric. Dec. 1140 (1955). Respondent held Messrs. Willingham and Anderson out as its agent, complainant relied on their representations, and was injured as a result of such good faith reliance.

Respondent's principal defense in this proceeding is that because there was a written contract entered on January 24, 1983, with respect to the terms and conditions surrounding the delivery of the potatoes, including the specification of exact weeks in which exact amounts of potatoes were to be delivered, those provisions cannot be varied by subsequent oral modifications agreed to between the parties.[5] Section 7-2-201(1) of the Alabama Commercial Code states:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract of sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Because the statute of frauds provision of Alabama states that it is not enforceable unless there is a writing when the contract is for more than $500, the holdings in *Rothenberg* v. *H. Rothstein & Sons,* 183 F.2d. 524 (3rd Cir. 1950), must be considered. The Third Circuit found with respect to transactions subject to the Perishable Agricultural Commodities Act that state law was not necessarily controlling with respect to a contract subject to the statute of frauds. It found that if a state statute of frauds rendered an oral contract void because it was not in writing, then the Secretary of Agriculture could not look further to determine whether there had been a breach of contract. If, however, the state statute of frauds, as is the

[5] Respondent raised numerous other defenses. They were essentially procedural in nature. It maintained, among other things, that complainant was inconsistent in his pleadings and testimony insofar as his theory of the case is concerned. We are not impressed by respondent's defense in this respect. While complainant did broach at least two different theories as to why the contract had been breached, i.e. that the contract time for delivery was extended by mutual agreement and that there were new contracts after July 1, 1983, between the parties, we do not believe that they are inconsistent with each other. Neither do we believe that respondent was put in any kind of difficult position by virtue of the fact that complainant amended its complaint during the hearing to reflect its belief that the contract provision had been amended to provide for delivery after July 1, 1983. This is particularly so because respondent was given and took advantage of the opportunity to have the hearing reopened to take further evidence. We would also note parenthetically that the fact that complainant's arguments on brief were not precisely attuned to his earlier theory of the case hardly lessens the credibility of Mr. Willoughby's testimony. The credibility of Mr. Willoughby's testimony is determined by the Presiding Officer based upon his observation of the witness, and the consistency with which Mr. Willoughby provided answers to questions, many of which were asked more than once. Mr. Willoughby at all times was a credible witness.

case for Alabama, is merely unenforceable if it is not in writing, it is only procedural and the Secretary of Agriculture can consider whether the oral contract was breached because pursuant to section 5 of the PACA (7 U.S.C. 499e) a party may sue either under state law or under the PACA.[6] Section 5 states in pertinent part as follows:

> (b) "Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter remedies now existing at common law or by statute, and the provisions this Act are in addition to such remedies."

Rothenberg, then, permits the Secretary of Agriculture to look at the facts standing behind an oral modification to a written contract to determine whether there has been a breach. This is extremely important in the perishable agricultural commodities industry because produce is perishable in nature, and if it is not rapidly disposed of, becomes worthless. The rule set forth in *Rothenberg* makes sense in terms of the industry which is to be regulated by the PACA. This industry is unique because the commodities are so perishable, frequently making it impossible for the seller to dispose of the commodity if it is rejected by a buyer who makes an oral promise to accept it.[7] Such is the case here. It is clear on the facts

[6] Complainant expressed some ambivalence as to whether the Texas or Alabama statute of frauds was applicable. Respondent dealt only with the Alabama statute. We find that the essential terms of the contract were entered in Alabama, and that the law of Alabama controls. In any event the statute of frauds of Texas renders contracts for the sale of goods of more than $500 unenforceable rather than void. See *Hegel Branch* v. *Mission Shippers*, 35 Agric. Dec. 726 (1976).

[7] Indeed, most contracts under the PACA are both for more than $500.00, and entered by oral communication which is subsequently memorialized by an invoice issued by the seller, but not assented to by the buyer except through acquiescence. The industry could be devastated if for each such contract the statute of frauds could be invoked to defeat enforceability.

Although there are factual distinctions, the principle set forth in *Hegel Branch* v. *Mission Shippers, Inc.*, supra note 6, at pages 731–32 is apposite here. The Judicial Officer stated:

> In matters involving the statute of frauds under the Perishable Agricultural Commodities Act, the Department has long followed the guidelines laid down in *Joseph Rothenberg* v. *A. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950), 9 A.D. 1272. In that case the court made it clear that a federal district court hearing a case on appeal from the Secretary under the Act does not sit as another court of the state and is not governed by the rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Such a case is rather "to be determined under the same rules of sub-

Continued

in this case that respondent's agents, Willingham and Anderson, in discussions with complainant, agreed to a modification of the contract. Such modification included all pertinent contractual terms. While there was no discussion as to price, it was clear that the price was to be the same as that provided for in the written contract simply because the agents were talking only about an extension of time in which to have the goods delivered to respondent.[8] Further, we are not aware of any holding which precludes an integrated written contract subject to the statute of frauds from being modified by subsequent oral agreement. Indeed, the Restatement of Contracts appears to point in the other direction.[9] What has not

stantive and procedural law as were involved in the Secretary's proceedings." (*Rothenberg,* supra). By the same token, *Rothenberg* also makes it clear that where the Act or regulations of the Secretary do not provide a solution to a problem of the validity of a contract, then state law is applicable. In the *Rothenberg* case the Court of Appeals, recognizing that since the statute of frauds of Pennsylvania was procedural rather thansubstantive it would not be applicable in a reparation proceeding. The court reasoned that "the federal act intends to grant a new remedy which is not dependent upon but is in addition to such other remedies as may be available to the parties at common law or by the statutes of any state", and that *where the statute of frauds of a particular state only precluded enforcement of an oral contract as a remedy, but left it otherwise valid, though unenforceable, such a procedural statute would have no effect upon a proceeding before the Secretary of a subsequent appeal therefrom.*

We feel that the substantive-procedural distinction as drawn in *Rothenberg* is valid and should remain applicable in reparation proceedings before the Secretary. There has always been a *reluctance to apply the statute of frauds in reparation decisions, due to the simple fact that oral contracts are extremely common in the fruit and vegetable industry.* Sales are commonly made interstate by phone, and where a broker is involved and issues a written confirmation, it is frequently not clear whose agent he was in the transaction. These factors combine to create situations where the application of the statute would work a fraud rather than prevent one. While the Secretary could by regulation provide that state statutes of frauds would not be applicable in reparation proceedings, he has not in fact done so. However, in the absence of such regulations we feel warranted in holding that in future cases the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable should be upon the party claiming the benefit of the statute. (emphasis added).

[8] It is basic contract law that any modification to a contract must be assented to by both parties. Further it is basic contract law that all of the essential terms of a contract must be set forth in the modification. We find that both of these requirements have been met in this instance.

[9] See Restatement Of The Law Second, Contracts 2d, ALI, 1981; section 216 of which states:

Continued

been determined is whether respondent's agreement to the modification of the contract was of such a nature that it must be held liable for the value of the entire 25,000 hundredweight of potatoes, less those which it received, accepted and paid for, and those which were sold by complainant to other purchasers in mitigation of damages.

The evidence shows clearly that each truckload of potatoes could comprise approximately 450 hundredweight. The evidence further shows that complainant could dig six truckloads worth of potatoes a day. Thus, from June 27 through July 1, 1983, complainant could have dug and delivered 30 truckloads of potatoes. This amounts to 13,500 hundredweight of potatoes.[10] In addition, it is clear that between July 5, 1983, and July 13, 1983, all of complainant's potatoes which wer e delivered to respondent were received and accepted as meeting respondent's requirements. Assuming that no potatoes would have been dug over the Fourth of July weekend, there would have been as many as 54 truckloads of potatoes dug during the nine day period between July 5 and July 13. That would amount to 24,300 hundredweight of potatoes. When added to the previous 13,500 hundredweight we arrived at a figure of 37,800 hundredweight of potatoes which could have been dug by complainant by July 13, 1983. That is more than the contract called for. Given the high quality of the load dug on June 30, 1983, as acknowledged by Mr. Anderson, We must assume that all of complainant's potatoes would have been acceptable to respondent had they been delivered by July 13, 1983. That they were not is the fault of respondent, who did not provide complainant with enough purchase orders to be able to do so. As mentioned before complainant relied upon the

"(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not complete integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumtances might naturally be omitted from the writing."

We find that the agreement herein was not completely integrated because it would be natural to omit an understanding that the actual dates for delivery of complainant's crop might vary in accordance with maturity and the needs of Frito-Lay for the potatoes. The agreement entered was a standard agreement for the purchase and sale of a crop.

[10] We are not impressed by the testimony by Mr. Anderson that complainant's equipment was consistently breaking down. Complainant explained that equipment on a farm always breaks down. He further stated that he keeps several thousand dollars worth of parts available to repair the equipment.

promises made by respondent's agents, who had at least apparent authority to make them, that his potatoes would be purchased, received, and accepted if they met the quality requirements of respondent. Therefore, complainant has met his burden of proof that all 25,000 hundredweight of potatoes were of the quality required by Frito-Lay. That leaves for resolution only the amount of damages which must be awarded.

The total contract price agreed upon between the parties for the 25,000 hundredweight of potatoes, at $5.50 per hundredweight, was $137,500.00. Respondent purchased, received and accepted 6,681.60 hundredweight of potatoes, and paid complainant $35,508.97, at the rate of $5.75 per hundredweight for those potatoes, less certain deductions pertaining to three loads which were reject. Complainant mitigated his damages by selling 3,329.93 hundredweight of potatoes to other purchasers in eight transactions, for total receipts of $14.580.00. Therefore, complainant suffered damages in the total amount of $87,411.03. Respondent's overpayment for the potatoes which it did receive at the rate of $.25 per hundredweight has been taken into account in the above computation. Since complainant only requested damages of $84,825.83 in its complaint, and damages were in an amount greater than that requested in the complaint complainant's award shall be limited to the amount originally requested. Respondent's failure to pay complainant $84,825.83 is a violation of section 2 of the Act for which reparation should be awarded with interest.

As the prevailing party complainant is entitled to reasonable attorney's fees and other expenses. Complainant claimed his attorney spent 16 hours preparing for the hearing at a rate of $100.00 per hour, and 15 hours at the hearing at a rate of $125.00 an hour, for a total charge of $3,475.00. Complainant's attorney also charged $100.00 per hour for 15 hours of time preparing for taking four depositions for a total charge of $1,500.00. In addition, complainant attorney spent 6½ hours taking the depositions at $125.00 an hour for a total charge of $812.50. Total attorney fees, therefore, were $5,787.50. In addition, there was $600.00 claimed for attorney travel to take the depositions. $1,550.00 was claimed for travel by witnesses, and subsistence, in order to appear at the hearing. Finally there was a claim of $535.89 for transcripts of the hearing and the depositions. The total claim for fees and expenses related to the hearing by complainant was $8,473.39. We find this sum to be reasonable, and an award in this amount should be made in favor of complainant, with interest thereon.

Respondent shall pay to complainant $84,825.83, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

Respondent shall pay to complainant for attorney's fees and other expenses $8,473.39, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

FRUIT MARKETING, INC., *v.* LOFCHIE INC., a/t/a BRUCE CO., PACA Docket No. 2-6857. Decided May 1, 1986.

Burden of proof as to breach and damages on respondent—breach of suitable shipping condition warranty—damages incurred by respondent deducted from contract price—reparation awarded.

Respondent sustained its burden of proving a breach of complainant's suitable shipping condition warranty regarding the truckload of peaches it accepted. Respondent incurred damages based on the difference between the contract price plus freight and the amount obtained upon resale. Respondent held liable for the contract price less its damages.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se.*
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,323.00 in connection with a truckload of peaches sold to respondent and shipped, in interstate commerce, to respondent's customer.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an op-

portunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answering statement, and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Fruit Marketing Inc., is a corporation whose address is P.O. Box 399, Del Rey, California.

2. Respondent, Lofchie Inc., a/t/a Bruce Co., is a corporation whose address is 325 W. Shields, Suite 102, Fresno, California. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately September 7, 1984, complainant sold to respondent a truckload of peaches consisting of 660 cartons at $5.85 per carton, plus $.70 per carton for cooling and palletization, for a total contract price of $4,323.00, f.o.b. The peaches were to be shipped to respondent's customer, Finest Fruit Co., Inc., Bronx, New York.

4. On September 8, 1984, complainant loaded the truck with 660 cartons of peaches and prepared a bill of lading, showing the shipping date of September 8, 1984, the destination as New York City, and the temperature to be maintained enroute as 36° F.

5. The peaches arrived at the place of business of respondent's customer in Bronx, New York, on September 14, 1984. At 3:45 a.m. that same day they were subjected to a federal inspection, which found as follows, in relevant part:

> VARIOUS CONTAINERS Range 38° *To 39°F.*
>
> Peaches "Del Pak Summerset 48-50". . . *Applicant States:* . . . 660 cartons of peaches. . . .
>
> *Condition: Peaches:* Mostly firm ripe, some ripe. Yellow ground color. 4 to 18%, average 11% damage by bruising, scattered throughout pack, affecting all stages of ripeness. 6 to 20%, average 13% damage by external brown discoloration. No decay.

6. The Market News Service Reports for Bronx, New York on September 14, 1984, shows that the supply of such peaches were too few to enable the quoting of a market price.

7. Respondent resold the peaches to Finest Fruit Co., Inc., for a total of $4,747.50.

8. Respondent has paid complainant $1,810.00 for the load of peaches at issue.

9. A formal complaint was filed on March 21, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent admits receiving and accepting the peaches, but claims that a federal inspection taken upon arrival showed they contained an excessive amount of condition defects, in breach of complainant's suitable shipping condition warranty. Complainant claims that it was not notified until September 25, 1984, 11 days after the peaches arrived, that the peaches had been inspected and found to contain condition defects. Complainant also contends that respondent has failed to prove that the temperature during transit was proper. Complainant further disputes respondent's claimed damages derived from its resale of the peaches.

Having accepted the peaches, respondent became liable for the agreed upon contract price, less damages arising from any breach of warranty by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983). As this was an f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, which is defined at 7 CFR 46.43(j) as meaning "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The September 14, 1984, federal inspection (Finding of Facts 5) revealed an average of 11% damage by bruising and 13% damage by external brown discoloration, for a total of 24% condition defects, which constituted abnormal deterioration. Complainant appears to be claiming that transportation conditions were abnormal, therefore voiding the suitable shipping condition warranty. While we agree with complainant that in an f.o.b. sale it is respondent's burden to prove that transportation conditions were normal (*Oneonta Trading Corporation* v. *Tommie's Cello-Pak, Inc.*, 40 Agric. Dec. 1798 (1981)), the evidence in the record shows that respondent has sustained this burden. The peaches were shipped from complainant in Del Rey, California on September 8, 1984, and arrived in Bronx, New York on September 14, 1984, six days later, which is a reasonable transit time for the distance covered. Further, the inspection report shows the temperature of the peaches as from 38° to 39°F., which is well within the normal range. The 11% damage by bruising was most likely caused by complainant loading some fruit that was softer than it should have been, as shown by

the inspection report's description of the peaches as "mostly firm ripe, some ripe." In view of the abnormal deterioration exhibited by the peaches when they arrived at respondent's place of business, and considering that transportation conditions were normal, we conclude that complainant breached its warranty of suitable shipping condition with respect to these peaches.

As damages from complainant's breach of warranty, respondent is entitled to the difference, at the time and place of acceptance, between the actual value of the peaches and their value if they had been as warranted. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest* v. *Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). The actual value is determined by a prompt and proper resale. Respondent has provided evidence that it sold the 660 cartons of peaches to Finest Fruit Co., Inc., Bronx, New York, for $4,747.50. There is nothing in the record indicating that this resale was not prompt and proper. For the value of the peaches if they had been as warranted, respondent urges that reference be made to the Market News Service Reports at Bronx, New York. However, the Market News Service Reports contain no listings for California peaches on September 14, 1984, the date of acceptance. We will therefore use the contract price plus freight. The contract price for these peaches was $6.55 per carton, for a total f.o.b. contract price of $4,323.00. According to the account of sales of Finest Fruit Co., Inc., the freight was an additional $1.91 per carton or $1,260.60, for a total of $5,583.60. If we subtract the actual value of the peaches, $4,747.50, from their value if they had been as warranted, $5,583.60, we find respondent's damages to have been $836.10. Respondent has not claimed any incidental damages. Therefore, respondent's liability to complainant is the f.o.b. contract price of $4,323.00 less its damages of $836.10, resulting in $3,486.90. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,486.90, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

THOMAS B. SMITH d/b/a THOMAS B. SMITH FARMS, *v.* I. M. C. BROKERAGE & PRODUCE CO., INC. PACA Docket No. 2-6777. Decided May 5, 1986.

Acceptance by taking possession of, and reselling, produce—neutral inspection necessary to show condition of produce—open-ended allowance not proven—failure to submit accounting of resale precludes award of damages—accord and satisfaction by holding check not shown—reparation awarded.

In f.o.b. sale of tomatoes respondent accepted by taking possession and reselling. Testimonial evidence of poor condition on arrival was discounted, a neutral inspection being necessary to establish condition of perishable produce. Respondent alleged that it was granted an open-ended allowance, but failed to prove this allegation by a preponderance of the evidence. Respondent failed to submit an accounting, and therefore could not have established its loss even had the allowance been proven. Complainant's retention of respondent's check marked "paid in full" was not deemed an accord and satisfaction, because complainant failed an informal complaint shortly after receiving the check and requested that the Department secure the check's release as an undisputed amount.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
James A. White, Esquire, Fayetteville, GA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $7,844.82 in connection with the shipment in interstate commerce of a truckload of tomatoes. The formal complaint was later amended to request an award in the amount of $10,362.00 in connection with the same load.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering

statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant is an individual, Thomas B. Smith, doing business as Thomas B. Smith Farms, whose address is Route 1, Box 129, Quincy, Florida.

2. Respondent, I. M. C. Brokerage & Produce Co., Inc., is a corporation whose address is 120 Lakeview Drive, Woolsey, Georgia. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about August 4, 1984, complainant sold to respondent, on an f.o.b. basis, one truckload of tomatoes having an invoice value, after deduction of an $800 credit on a previous load, of $10,362.00.

4. On or about August 4, 1984, complainant shipped the tomatoes from loading point in Quincy, Florida to respondent in Woolsey, Georgia by means of respondent's truck. Upon arrival at respondent's place of business in Woolsey, Georgia the tomatoes were accepted by respondent. Respondent tendered payment to complainant in the amount of $3,318.00, marking the check payment in full. Complainant returned this check to respondent.

5. The formal complaint was filed on January 28, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the full purchase price of a truckload of tomatoes sold to respondent. Although respondent contends that the tomatoes were not accepted, the record clearly shows that respondent took possession of the tomatoes and resold them. There is no credible evidence that respondent gave complainant any timely notice of rejection prior to unloading the tomatoes. See *Santa Clara Produce* v. *Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982). Since respondent accepted the tomatoes it became liable to complainant for the full contract price less any damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *J. Prettyman, Jr.* v. *D. J. LaMantia,* 41 Agric. Dec. 1614 (1982).

Respondent contends that the subject tomatoes arrived in poor condition. Respondent also contends that it deducted substantial amounts from complainant's invoice because of poor deliveries on two other shipments of tomatoes which are referred to by complainant in his formal complaint. Respondent sought to establish

by affidavit testimony that the tomatoes were in poor condition. We have held many times that testimonial evidence in regard to the condition of perishable produce must be discounted. An inspection by a neutral party conducted on the basis of scientific sampling and an accurate description of the percentage of grade defects, or condition defects, is necessary. See *Mutual Vegetable Sales, v. Select Distributors,* 38 Agric. Dec. 1359 (1979).

Respondent submitted an affidavit by one of its employees, J. Ron Howard, who stated that he was in charge of sales, purchasing, and receiving tomatoes. Mr. Howard stated that as to one of the two previous loads of tomatoes, that which was shipped on July 16, 1984, he had a conversation with a person identified only as "Bud" who he understood to be the person in charge of sales for complainant. Mr. Howard stated that Bud acknowledged that the July 16, load of tomatoes was of poor quality, and promised that "any loss as a result of the poor quality would be made up." Respondent asserts that the loss on the load was $2,028.00. Complainant submitted the affidavit of W. H. Fulford, Jr., who stated that on or about July 16, 1984, he spoke directly with Mr. I. M. Cartwright of respondent's firm about respondent's dissatisfaction with the July 16, 1984, load of tomatoes. Mr. Fulford states that, as the salesman involved, he was authorized by Mr. Smith to grant to Mr. Cartwright a 50 cents per box credit for the tomatoes which totalled $800. Mr. Fulford stated that this amount was deducted from the invoice for the tomatoes shipped on August 4, 1984. We find that respondent has failed to prove the open ended allowance which it has alleged. In addition we note that respondent failed to supply us with any accounting of the resale of the tomatoes shipped on July 16, 1984, and that consequently respondent would not have been able to recover the alleged loss of $2,028.00 in any event.

Mr. Howard also made essentially the same allegations in regard to tomatoes shipped on July 26, 1984. Mr. Fulford stated in his affidavit that he did not speak with Mr. Cartwright about any other complaints, and that there was a price adjustment on only one load, namely the load on July 16, 1984. Again, as to this load respondent did not submit an accounting of the resale of the tomatoes, and therefore we could not allow the alleged loss of $768.00 in regard to these tomatoes in any event.

In regard to the subject tomatoes shipped on August 4, 1984, Mr. Howard again alleged that he had conversations with "Bud" concerning the alleged poor quality of the tomatoes and resulting losses. Mr. Howard stated that "Bud" advised that the problem would be taken care of. This allegation is, of course, also answered

by the affidavit of Mr. Fulford, and again, we note that respondent did not submit an accounting of the resale of this last load of tomatoes. Accordingly respondent could not have recovered the alleged loss of $4,248.00 in any event.

In its answer respondent raised as a defense the allegation that there had been an accord and satisfaction in regard to the August 4, 1984, shipment of tomatoes as a result of the retention by complainant of an August 20, 1984, check in the amount of $3,318.00 which had typed thereon the notation "paid in full all tomatoes". The record discloses that respondent did not return the check to complainant until February 8, 1985, when it filed its amendment to the formal complaint. However, the record also shows that complainant filed with this Department an informal complaint on October 3, 1984, and clearly stated therein that he was not accepting respondent's check for $3,318.00 marked paid in full. Respondent was given notice of the informal complaint by a letter from this Department dated October 16, 1984, and such letter specifically requested that respondent release the check to complainant as an undisputed amount without prejudice to the rights of either party regarding the balance in dispute. The Department asked that respondent reply by October 30, 1984. Respondent did not reply to the Department's letter until November 30, 1984, and in its reply made no reference whatever to the check being held by complainant. We do not believe that the record in this proceeding supports respondent's contention that there was an accord and satisfaction as a result of retention of the check by complainant.

As we stated earlier respondent accepted the tomatoes, and thus became liable to complainant for the full purchase price of $10,362.00. Respondent has not proven any breach on the part of complainant, or any modification of the original contract which would allow payment of a lesser amount. Accordingly, respondent is liable to complainant for the full purchase price of $10,362.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $10,362.00, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid

Copies of this order shall be served upon the parties.

G.A.C. PRODUCE CO., INC., *v.* THE OTAY PACKING CO., PACA Docket No. 2-6872. Decided May 5, 1986.

Allegation of credit uncontradicted—undisputed—complaint dismissed.

Complainant failed to offer any rebuttal to respondent's allegation that a credit had been allowed on two shipments of tomatoes. It was concluded that the credit had been granted.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $53,166.00 in connection with several shipments of tomatoes in contemplation of movement in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability to complainant in the amount of $50,574.00, and denying liability to complainant for the balance claimed. An order requiring respondent to pay complainant the sum of $50,574.00 as an undisputed amount was issued on August 26, 1985, pursuant to section 7(a) of the Act (7 U.S.C. § 499g(a)) and section 47.8(b) of the Rules of Practice (7 CFR § 47.8(b)).

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between September 17, and September 22, 1984, complainant sold to respondent 8,664 containers of tomatoes, 6×6 size and larger, approximately 85% U.S. No. 1 grade or better, for the total price of $53,166.00 f.o.b. complainant's warehouse in Chula Vista, California.

4. Between September 17, and September 22, 1984, complainant shipped the tomatoes from its warehouse in Chula Vista, California to respondent in Chula Vista, California in contemplation of subsequent movement in interstate commerce. Respondent accepted the tomatoes upon arrival.

5. At some time after arrival of the tomatoes complainant granted respondent an allowance of $1.00 per carton on two shipments containing 1,296 cartons each, or a total allowance of $2,592.00.

6. The formal complaint was filed on March 5, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent admitted liability to complainant, in its answer, in the total amount of $50,574.00. On August 26, 1985, an order was issued requiring respondent to pay complainant the amount of $50,574.00 as an undisputed amount. In its answer respondent's vice president, Earl Tachiki, stated that complainant had agreed to give respondent a credit of $1.00 per carton on two shipments containing 1,296 cartons each. The total amount of the alleged credit was $2,592.00. Complainant had the opportunity to rebut the statement by respondent's president but failed to do so. There is no evidence in the record which contradicts the statement by respondent's president. Accordingly, we conclude that complainant granted respondent an allowance of $1.00 per carton on the two shipments, or a total allowance of $2,592.00. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

NAPLES TOMATO GROWERS, INC., *v.* PETER G. PAPPAS and PHILIP G. PAPPAS d/b/a PETE PAPPAS & SONS, PACA Docket No. 2-6879. Decided May 5, 1986.

F.o.b. sale—special price agreement—reparation awarded.

Parties agreed that tomatoes were to be sold f.o.b. with price to be determined by "next week's market." Respondent contended that price was to be determined as of the day following shipment. It was held that the price term used required use of an average price for the whole business week following shipment.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
George S. Charles, Washington, DC, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,800.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Naples Tomato Growers, Inc., is a corporation whose address is Route 2, P.O. Box 1700, Naples, Florida.

2. Respondent, is a partnership composed of Peter G. Pappas and Philip G. Pappas doing business as Pete Pappas & Sons, whose address is 1401 Okie Street, N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 20, 1985, complainant sold to respondent one truckload of mature green tomatoes consisting of 800 25 pound cartons of size 6×6, and 800 25 pound cartons of size 6×7, Beef Stake Brand, with the price to be established on the basis of "next week's market".

4. The tomatoes were federally inspected on January 20, 1985, at shipping point, and found to grade U.S. combination with at least 85% U.S. No. 1, and no decay.

5. Complainant shipped the tomatoes to respondent on January 20, 1985, and such tomatoes were accepted by respondent on arrival in Washington, D. C.

6. The average of the prices quoted for the Florida shipping point market during the week of January 21–25, 1985, was $15.33 for size 6×6, and $13.25 for size 6×7 tomatoes, 85% U.S. No. 1 or better. The average of the prices during the same period of time for the Washington, D. C. area (Jessup, Maryland) was $15.50 for size 6×6, and $13.50 for size 6×7 tomatoes of generally good merchantable quality and condition.

7. The formal complaint was filed on April 16, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover for the tomatoes sold to respondent on the basis of $14.00 per carton for the size 6×6 tomatoes, and $12.00 per carton for the size 6×7 tomatoes. This would amount to a total price of $20,800.00 for the truckload of tomatoes, and complainant also maintains that it should be allowed $240.00 for palletizing, or a total of $21,040.00, f.o.b., Naples, Florida. Respondent has remitted to complainant $16,240.00 for the truckload of tomatoes, which amounts to $11.00 for the size 6×6 tomatoes, and $9.00 for the size 6×7 tomatoes, plus $240.00 for palletizing. Both parties seem to be agreed that the term "next week's market" referred to the week beginning January 21, 1985, rather than the literal next week which would begin on Sunday January 27, 1985. Respondent submitted Market News Reports for Jessup, Maryland which not only showed tomato prices for that market, but also showed shipping point prices for South & Central Florida. The reports submitted by respondent covered Monday, January 21, through Monday, February 4, 1985. As stated in the Findings of Fact, the average price for the size 6×6 tomatoes during the week of January 21, through 25, at shipping point, was $15.33 per carton, and for the 6×7 tomatoes, $13.25 per carton. However, this is an average of only 3 days, namely January 21, 24, and 25, since there were no price quotations for January 22, and January 23. The prices shown

at shipping point for January 21, for size 6×6 were $9.00 to 10.00, mostly $10.00, and for size 6×7 $7.50 to $8.00. The prices for January 24, and January 25, were $18.00 for the size 6×6, and $16.00 for the size 6×7. A corresponding rise in price was also shown for the Jessup, Maryland market, but such market additionally showed quotations for January 22, and 23. These prices were generally sustained for Monday, January 28, and began falling on January 29, 1985.

Respondent maintains that the price which it should pay to complainant should be based on the market price for January 21, 1985. However, although the record does not disclose when the tomatoes arrived, it is unlikely that respondent could have begun selling the tomatoes any earlier than January 22, 1985, at the earliest. We believe that the terms of sale used by the parties contemplated that the price would be set on the basis of the average price for the week of January 21, 1985. Such average price, both at shipping point and at Jessup, Maryland, was in excess of the price being asked in this proceeding by complainant. We conclude that the terms of sale require that respondent pay complainant at least such price, or the requested $14.00 per carton for the size 6×6, and $12.00 per carton for the size 6×7, plus $240.00 for palletizing, or a total for the truckload of $21,040.00. Respondent has already paid complainant $16,240.00 of this amount, which leaves a balance still due of $4,800.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,800.00, with interest thereon at the rate of 13 percent per annum from February 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., *v.* METRO PRODUCE INC., PACA Docket No. 2-6883. Decided May 5, 1986.

Contract price protected on arrival—with acceptance, buyer must pay contract price less damages proven—reparation awarded.

Buyer/respondent accepted potatoes but claimed agreement was that price was to be protected through sale. Complainant asserted contract term was that price was protected only until arrival. Conflicting affidavits could not be resolved but evidence showed market did not drop between shipment and arrival and that respondent's

real concern was with the quality of potatoes. Respondent offered no evidence as to breach and damages as to quality nor no evidence to show it promptly and properly resold potatoes and the price it received. Therefore, respondent was liable for contract price less amount already permitted.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,275.00 in connection with the sale of potatoes in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

In its answer, respondent denied liability claiming that the contract price was not to be determined until after sale, and asserting that it had paid complainant the amount respondent received after sale.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Both parties filed opening statements. Both parties declined an opportunity to file briefs.

FINDINGS OF FACT

1. Complainant Nick Delis Company, Inc., hereinafter referred to as the complainant, is a corporation whose mailing address is P.O. Box 1089, Millbrae, California 94030.

2. Respondent Metro Produce, Inc., hereinafter referred to as respondent, is a corporation whose mailing address is 12374 Helen, Southgate, Michigan 48195.

3. Both parties are, and at all times material herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. On April 26, 1984, complainant sold to respondent 910 cartons of U.S. No. 1 White Rose potatoes at an invoice price of $6.00 per carton plus a temperature recorder at $22.50 for a total F.O.B. in-

voice price of $5,482.50. The goods were shipped in interstate commerce and received and accepted by respondent on May 2, 1984.

5. Respondent has remitted a total of $3,207.50 in payment for these potatoes.

6. The formal complaint was filed on March 4, 1985. An informal complaint was filed on November 2, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over the price term in the contract. Respondent claims that its agreement was that it was to be protected as to price through sale, that is that price was to be determined after sale. Complainant asserts, however, that the agreement was to protect respondent as to price only until arrival of the commodity. The invoice in question contains a notation "price protected on arrival." Respondent claims, however, that this was error and that it corrected the original of the invoice and returned it to complainant. Complainant, however, filed the affidavit of Paul Brown, its salesman at the time, in which he states that he agreed only to a protection of the price until arrival and specifically denies that he agreed to give protection of the entire load or to any other price adjustment. Significantly, respondent has not submitted the corrected invoice.

We are faced with two sworn statements asserting diametrically opposite stories. Whether there was a misunderstanding, or one party's statement is erroneous cannot be determined. An examination of the entire record, however, reveals several factors helpful to the resolution of this matter. First, there is no contention that the price of potatoes dropped while they were in transit. The $6.00 per carton, therefore, seems to be consistent with the prevailing market price. Second, respondent's real complaint seems to be that the potatoes were of only "fair" size and quality. However, respondent has offered neither a U.S.D.A. inspection nor any other evidence to demonstrate that the potatoes were of lesser quality than warranted. Finally, respondent has not submitted accountings showing what it received upon resale of the potatoes.

Having accepted the potatoes, respondent is liable for the contract price less any damages sustained. See *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato Co.* v. *The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). As noted above, the evidence indicates that the market price was $6.00 per carton at the time the potatoes were accepted. Respondent is liable to pay this amount unless it can ---ve damages. Respondent, however, has submitted no evidence to

support a contention that the potatoes were worth less than $6.00 per carton. A mere statement as to amount of money received upon the resale of the potatoes without the accountings and without evidence demonstrating prompt and proper resale is not sufficient to meet respondent's burden to prove damages.

Therefore, complainant is entitled to receive the value of the goods shipped plus the cost of the temperature recorder. It is entitled to receive $5,482.50, of which is has received $3,207.50, leaving a total of $2,275.00 still due and owing. Respondent's failure to pay that amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within 30 days of the date of this decision, respondent Metro Produce, Inc., shall pay complainant Nick Delis Company, Inc., the amount of $2,275.00 as reparation, plus interest at 13 per cent per annum from June 1, 1984, until paid.

Copies of this Order shall be served upon the parties.

BELRIDGE PACKING CO., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7111. Decided May 5, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $29,534.50 in connection with two shipments of carrots in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Belridge Packing Co., is a corporation whose address is P. O. Box 1852, Bakersfield, California 93303. Respondent,

Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $29,534.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $29,534.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ROGER HARLOFF PACKING, INC., *v.* JOHN LIVACICH PRODUCE, INC., a/t/a VISTA SALES, PACA Docket No. 2-6829. Decided May 15, 1986.

F.o.b. sale and acceptance—authority of broker to negotiate protection agreement not established—protection agreement voided by failure to keep records of resales and losses—reparation awarded.

Respondent accepted two loads of tomatoes and alleged that protection was granted after acceptance. Evidence was insufficient to show whether protection was granted by complainant or by broker acting on his own. In either event, respondent did not furnish records of resales and losses. Consequently, any protection agreement would be voided.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $972.00 in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Roger Harloff Packing, Inc., is a corporation whose address is P.O. Box 1787, Bradenton, Florida.

2. Respondent, John Livacich Produce, Inc., is a corporation also trading as Vista Sales, whose address is 2231 Willow Brook Drive, Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about December 2, 1983, complainant sold to respondent 1,008 25 pound boxes of Palmetto Beauty U.S. No. 2 5 ×6 cartons of tomatoes at $3.00 per carton, and 504 2 5 pound cartons of Palmetto Beauty U.S. No. 2 6 ×6 cartons of tomatoes at $2.00 per carton, plus $226.80 for palletizing, and $22.50 for a temperature recorder. Complainant later granted respondent a reduction in price of $1.00 per carton on 360 cartons of the 5 ×6 tomatoes, reducing the total price for the truckload to $3,921.30.

4. The tomatoes covered by Finding of Fact 3 were federally inspected at Palmetto, Florida on November 26, 27, and 28, 1983, and found to grade U.S. No. 2 with no decay. Complainant shipped the tomatoes from loading point in Palmetto, Florida to respondent in Vista, California on December 2, 1983.

5. On December 2, 1983, complainant sold to respondent 1368 25 pound boxes of Palmetto Beauty U.S. No. 2 6 ×6 tomatoes at $3.00 per carton 72 25 pound boxes of Palmetto Beauty U.S. No. 2 6 ×7 tomatoes at $2.00 per carton, and 144 25 pound boxes of Palmetto Pride U.S. Combination grade tomatoes at $2.00 per carton, plus palletizing in the amount of $237.60; and a temperature recorder in the amount of $22.50, for a total f.o.b. price of $4,796.10.

6. The tomatoes covered by Finding of Fact 5 were federally inspected at Palmetto, Florida on November 28, and 29, 1983, and the 1368 cartons of 6 ×6 tomatoes and 72 cartons of 6 ×7 tomatoes were found to grade U.S. No. 2 with no decay. The 144 cartons of 6 ×7 tomatoes were found to grade U.S. Combination with no decay. Complainant shipped the tomatoes covered by Finding of Fact 5

from Palmetto, Florida to respondent in Vista, California on December 2, 1983.

7. Respondent received and accepted the two truckloads of tomatoes and has paid complainant only $7,745.40 leaving a balance still due and owing of $972.00.

8. An informal complaint was filed on March 5, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent took possession of the two truckloads of tomatoes on arrival at destination and is therefore deemed to have accepted such tomatoes. However, respondent maintains that a protection agreement was entered into in regard to both loads of tomatoes after their arrival. This allegation by respondent seems to be confirmed by a letter contained in the report of investigation from the broker who negotiated the sale of the two truckloads of tomatoes. Such letter indicates that protection was granted in regard to both loads due to "excessive color". However the wording of the broker's letter does not make it clear whether the protection was granted by complainant or by the broker acting on his own.

Whether or not complainant authorized the protection agreement alleged by respondent, we have held that it is incumbent upon a receiver who has such an agreement to keep records which substantiate its resales and losses. See *Dave Walsh Co.* v. *Liberty Fruit Co.*, 38 Agric. Dec. 533 (1979). Respondent did not supply any records which would adequately substantiate the resales, and losses resulting from such resales. As a consequence of such failure we must view any protection agreement as voided. See *Demarco Produce Co., Inc.* v. *J. R. Cortes & Co.*, 39 Agric. Dec. 1256 (1980).

Since respondent accepted the tomatoes it became liable to complainant for the full purchase price thereof, less any damages resulting from any breach of contract on the part of complainant. Although it was alleged that the tomatoes arrived with excessive color, respondent supplied us with no arrival inspections which would substantiate this claim. Accordingly we find that respondent has failed to show any breach on the part of complainant. Respondent is liable to complainant for the full purchase price of the tomatoes less the adjustment in price which complainant has admitted t granted, or a total of $8,717.40. Respondent has already paid omplainant $7,745.40 of this amount, which leaves a balance stillue and owing $972.00. Respondent's failure to pay complainant uch amount is a violation of section 2 of the Act for which reparaon should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $972.00, with interest thereon at the rate of 13% per annum from January 1, 1984, until paid.

Copies of this order shall be served upon the parties.

I. R. JEROME COMPANY, LTD., *v.* CORGAN & SON, INC., PACA Docket No. 2-6861. Decided May 15, 1986.

Contract terms contained in broker's confirmations of sale—breach of warranty not proven by respondent buyer—reparation awarded.

Where the parties disagreed about the contract terms, the most convincing evidence was the broker's confirmations of sale, to which neither party objected. Respondent buyer failed to sustain its burden of proving a breach of warranty by the complainant seller.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,234.80, in connection with the sale and consignment of two truckloads of melons to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, I. R. Jerome Company, Ltd., is a corporation whose address is P. O. Box 1030, Parker, Arizona.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately July 9, 1984, complainant sold to respondent a truckload of melons consisting of 540 cartons of honeydews and 714 cartons of cantaloupes. The honeydews were composed of 180 cartons of number 4's at $3.00 per carton, 180 cartons of number 5's at $3.60 per carton, and 180 cartons of number 6's at $3.60 per carton, plus $.40 per carton for palletizing, or $2,052.00, f.o.b. The cantaloupes were composed of 336 cartons of 15's at $4.50 per carton, and 378 cartons of 18's at $5.00 per carton, plus $.80 per carton for palletization, or $3,973.20, f.o.b. The contract price also included a brokerage fee of $.20 per carton, or $250.80, and $22.50 for a temperature recorder, for a total of $6,298.50. Frank Minardo, Yuma, Arizona, acted as the broker, and issued a confirmation of sale setting forth the contract terms, which he sent to both parties. The confirmation clearly stated that complainant was the seller and respondent the buyer. Neither party objected to this confirmation.

4. The July 9, 1984, load was shipped in interstate commerce to respondent, which received and accepted it upon arrival.

5. Respondent has paid complainant $5,098.50 for the July 9, 1984, load, but has failed to make any additional payments to complainant.

6. On [illegible]

firmation to the shipper and our invoice for 20¢ brokerage. We reported the results of the federal inspection that Corgan relayed to us, and went on record with there [sic] sales man Mr. Ed Senini and sent a copy to the shipper.

8. The July 13, 1984, load of melons was shipped in interstate commerce to respondent, which received and accepted it. Respondent secured a federal inspection of the cantaloupes only.

9. Respondent has paid complainant $3,126.00 for the 1,092 cartons of melons, but has failed to make any additional payments to complainant.

10. A formal complaint was filed on January 19, 1985, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Complainant's assertions that it sold respondent the July 9, 1984, load and consigned to respondent the July 13, 1984, load are denied by respondent. Respondent claims that it purchased both loads on an f.o.b. basis from the broker, assuming he was the seller. Respondent also asserts that the melons were in bad condition on arrival and, consequently, the broker agreed to certain price adjustments.

While the record contains evidence supporting the positions of both parties, the most convincing evidence consists of statements and documents issued by the broker, who is presumed to be without bias. The broker's December 20, 1984, letter (Finding of Fact 7) and the enclosed confirmations of sale make it clear that he was engaged only as a broker between complainant, the seller, and respondent, the buyer. The letter says further that both loads were sold on an f.o.b. basis, and this is supported by his confirmations, to which neither party objected. According to these confirmations, the contract price was $6,298.50 for the July 9, 1984, load and $4,292.40 for the July 13, 1984, load. We believe the broker's confirmations reflect the agreed upon contract terms.

In respondent's unsworn answer, it does not deny receiving or accepting the two loads of melons and, therefore, is liable for the agreed upon contract prices therefor, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983).

Respondent has not presented any credible evidence to support its claim that it owes less than the full contract price of $6,298.50 to complainant for the July 9, 1984, load and is thus liable for that amount.

With respect to the July 13, 1984, load, respondent contends that the melons were in poor condition and, therefore, it agreed with the broker to adjust the prices to $3.50 per carton for the cantaloupes, $2.25 per carton for the honeydews, $4.00 per carton for the crenshaws, and $2.00 per carton for the casabas. The record does indicate that a federal inspection was taken on July 19, 1984, of the 420 cartons of cantaloupes contained in the July 13, 1984, load. Since respondent's claim that the adjusted price resulting from this inspection was $3.50 per carton, which is greater than the $3.30 per carton set forth in the broker's confirmation, we will accept respondent's admission of liability. There is no evidence whatsoever that any of the other melons comprising the July 13, 1984, load were in anything but good condition, and thus we will apply the price set forth in the broker's confirmation for all commodities except the cantaloupes. We, therefore, find the adjusted purchase price to have been $4,376.40.

Respondent incurred liability of $6,298.50 for the July 9, 1984, load and $4,376.40 for the July 13, 1984, load, for a total of $10,674.90. Having paid complainant $8,224.50, respondent owes an additional $2,450.40, and its failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,450.40, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FOUR STAR TOMATO, INC., *v.* TOMATOES, INC., PACA Docket No. 6834. Decided May 15, 1986.

Burden of proof—special agreement as to price—reparation awarded.

In f.o.b. sale of tomatoes respondent alleged that the invoice prices were incorre and that instead the parties had a special agreement that price was to be based the prices which respondent was paying to other packing houses for tomatoes. F spondent was found to have failed to prove its contentions by a preponderance the evidence.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,124.00 in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which failed to file a timely answer, and was found to be in default. A default order was issued on March 20, 1985, and on April 1, 1985, respondent filed a petition to reopen this proceeding after default. On April 16, 1985, the default order of March 20, 1985, was stayed, and complainant was served with a copy of respondent's petition, and given 15 days in which to file an answer thereto. On May 24, 1985, after receipt of complainant's answer to respondent's petition, respondent's default was set aside, and respondent's answer which had been previously submitted was ordered filed. In its answer respondent denied any liability to complainant on the two tomato transactions.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Four Star Tomato, Inc., is a corporation whose address is P.O. Box 470, Ellenton, Florida.

2. Respondent, Tomatoes, Inc., is a corporation whose address is New York City Terminal Market, 400–402 Room D, Bronx, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 11, 1984, complainant sold to respondent 504 25 pound cartons of 5×6 and larger tomatoes at $9.00 per carton, and 1,080 25 pound cartons of 6×6 tomatoes at $7.00 per carton, plus $.15 per carton for palletizing, or a total of $12,333.60, f.o.b. The tomatoes were federally inspected at shipping point in Palmetto, Florida on May 11, 1984, and found to grade U.S. combination with at least 85% U.S. No. 1 quality, and no decay. Complainant shipped the tomatoes to respondent on May 12, 1984, and issued its invoice for such tomatoes on May 18, 1984.

4. On May 12, 1984, complainant sold to respondent 504 25 pound cartons of 5×6 and larger tomatoes at $9.00 per carton, 360 25 pound cartons of 6×6 tomatoes at $6.00 per carton, 216 25 pound cartons of 5×6 and larger U.S. No. 2 tomatoes at $7.50 per carton, 72 25 pound cartons of 6×6 U.S. No. 2 tomatoes at $4.50 per carton, 360 25 pound cartons of 5×6 and larger U.S. No. 3 tomatoes at $4.50 per carton, and 72 25 pound cartons of 6×6 U.S. No. 3 tomatoes at $3.50 per carton, plus $.15 per carton for palletizing, or a total of $10,749.60, f.o.b. On May 12, 1984, the tomatoes were federally inspected at Palmetto, Florida, and the 504 5×6 and larger tomatoes, and the 360 6×6 tomatoes were found to grade U.S. combination with at least 80% U.S. No. 1 quality, and no decay. The remaining tomatoes were found to grade in accord with the contract specifications with no decay. Complainant shipped the tomatoes from loading point in Florida to respondent on May 14, 1984, and issued its invoice covering such tomatoes on May 19, 1984.

5. Respondent accepted both shipments of tomatoes upon arrival at destination, and has paid complainant only $11,253.60 toward the shipment of May 12, and $9,705.60 toward the shipment of May 14, 1984. There remains due and owing from respondent to complainant a balance of $2,124.00.

6. The formal complaint was filed on October 15, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of two shipments of tomatoes. Respondent alleges that complainant is charging the wrong prices for the tomatoes, and that "the prices were to be based on the Market price that was sold to us by other packing houses at that time." Respondent submitted copies of two invoices from another Florida packer in support of this contention. However, the two invoices are dated May 17, 1984, and May 18, 1984, and these dates do not correspond to the sale dates of the two loads of tomatoes in question here. Furthermore, the invoices submitted by respondent do not disclose the grade of

the tomatoes that are listed thereon. Later in the proceeding respondent submitted one additional invoice dated May 11, 1985, but covering a shipment of May 9, 1985. This invoice shows 5×6 tomatoes selling at $4.50 per container, and 6×7 tomatoes selling at $2.00 per container. Again this invoice fails to show the grade of the tomatoes in question.

Complainant denied respondent's allegations in regard to the pricing method applicable to the two loads of tomatoes, and submitted a copy of a May 11, 1984, Market News Report covering f.o.b. prices of tomatoes in South and Central Florida which shows that the prices charged by complainant were in accord with the market prices disclosed thereon. Although respondent states that upon receiving the invoices sent by complainant, it called complainant on the telephone and complained, respondent did not object to such invoices in writing. On the basis of all of the evidence herein we conclude that respondent has failed to prove its contention in regard to the pricing of the tomatoes by a preponderance of the evidence. We also conclude that complainant has proven by a preponderance of the evidence that the prices listed in its invoices were the contract prices agreed upon by the parties. Respondent is liable to complainant for a balance of $2,124.00 on the two loads of tomatoes. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,124.00, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

LYN-DE FARMS, INC., v. MIDWEST PRODUCE BROKERAGE, INC., P&S Docket No. 2-6925. Decided May 16, 1986.

With acceptance burden shifts to respondent to show breach and damages—reparation awarded.

Respondent claimed that complainant had authorized deductions off the purchase invoice which complainant denied. A letter from complainant's salesman instructing respondent to pay the invoice price and he would make it up to him at some other time established that there was no agreement as to a price adjustment. Respondent therefore was required to pay invoice price unless it proved damages for which contention it offered no evidence. Respondent was ordered to pay invoice price less amount already remitted.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $307.88 in connection with the sale of two loads of lettuce in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability. It admitted the purchase of the lettuce, but alleged that with respect to the first load it was authorized a deduction off the invoice price because the lettuce was not of the size warranted. With respect to the second load, respondent alleged that complainant agreed to a $.25 per carton adjustment.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Neither party submitted additional evidence, but complainant did file a brief. Respondent did not file a brief.

FINDINGS OF FACT

1984, complainant shipped 711 cartons of lettuce at a price of $2.50 per carton plus $.65 for cooling or a total contract price of $2,239.65. On December 7, 1984, complainant shipped 328 cartons at a per carton price of $2.75 plus $.65 for cooling or a total price of $1,115.20 for this transaction. The total contract price for the two loads was $3,354.85.

5. Respondent has remitted a total of $3,046.97 for these purchases.

6. The formal complaint was filed May 21, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over whether there was an agreement as to a price adjustment on each of the two shipments. Respondent contends that the size of lettuce in the first shipment was not as warranted, and that complainant authorized respondent to make an appropriate deduction. Respondent further alleges that it was given a $.25 per carton adjustment by complainant on the day of arrival of the second load. In support of its claim respondent attaches a letter from complainant's salesman. A review of the letter, however, demonstrates that Mr. Zinno, complainant's salesman, denied agreeing to any deductions or adjustments.

Having accepted the goods, respondent must pay contract price less any provable damages. The invoices are the best evidence of the contract price. Respondent has the burden of proving that an adjustment to the invoice price was agreed to. The letter from Mr. Zinno contains the following sentence: "In our last conversation I told him [respondent] to pay the invoices as they were billed and I would make it up to him at some other time." What Mr. Zinno might have agreed to do at some future time is unclear. However, the letter specifically states that Zinno expected respondent to pay full contract price. Respondent's own evidence demonstrates that no agreement as to an adjustment of the invoice price was reached. Respondent offers no evidence to support its claim that the lettuce on the first load was not of the size warranted. It has, therefore, failed to show any damages as to either load.

Respondent is liable to pay the entire contract price of $3,354.85. It has remitted only $3,046.97, leaving a deficiency of $307.88.

The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of $307.88, with interest.

Within 30 days from the date of this order, respondent shall pay to complainant $307.88 as reparation with interest thereon at the rate of 13 percent per annum from January 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

DEW-GRO, INC., a/t/a CENTRAL WEST PRODUCE, *v.* BEACON PRODUCE CO., PACA Docket No. 2-7108. Decided May 16, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,150.50 in connection with a shipment of broccoli in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dew-Gro, Inc., a/t/a Central West Produce, is a corporation whose address is 1284 West Main Street, Santa Maria, California 93454. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,150.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation $6,150.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DELAWARE PRODUCE GROWERS, INC., v. BEACON PRODUCE CO., PACA Docket No. 2-7113. Decided May 16, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *Pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,644.60 in connection with three shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Delaware Produce Growers, Inc., is a corporation whose address is Route 4, Box 127, Dover, Delaware 19901. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $4,644.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,644.60, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

Copies of this order shall be served upon the parties.

BLUE ANCHOR, INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7106. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $27,880.50 in connection with six shipments of mixed fruit in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Blue Anchor, Inc., is a corporation whose address is P. O. Box 15498, Sacramento, California 95851. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $27,880.50. Accordingly, within 30 days from the date of this

respondent shall

PECOS CANTALOUPES CO., INC. *v.* BEACON PRODUCE CO., PACA Docket No. 2-7107. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $8,064.00 in connection with a shipment of cantaloupes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Pecos Cantaloupes Co., Inc., is a corporation whose address is P. O. Box 1389, Pecos, Texas 79772. Respondent, Beacon Produce Company, is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $8,064.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $8,064.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DICK BARRETT PRODUCE, INC., a/t/a BARRETT-FISHER CO., INC., v. BEACON PRODUCE CO., PACA Docket No. 2-7109. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,612.50 in connection with a shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dick Barrett Produce, Inc. a/t/a Barrett-Fisher Company, is a corporation whose address is P. O. Box 750, Hereford, Texas 79045. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $5,612.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,612.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DYNASTY FARMS, INC., v. BEACON PRODUCE CO., PACA Docket No. 2-7110. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,981.60 in connection with a shipment of cantaloupes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issurance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dynasty Farms, Inc., is a corporation whose address is 9123 North Cave Creek, Phoenix, Arizona 85020. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under theAct.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,981.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,981.60, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER, d/b/a MEYER TOMATOES, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7125. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,920.00 in connection with three truckloads of tomatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Robert L. Meyer, d/b/a Meyer Tomatoes, is an individual whose address is P. O. Box 606, King City, California 93930. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,920.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $6,920.00, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ACTION PRODUCE, v. INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7126. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,989.50 in connection with three truckloads of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Action Produce, is a partnership composed of Rala Singh, Pat H. Hodges, Davis Packing Co., and John Kai. The partnership's mailing address is P. O. Box 1712, Glendale, Arizona 85311. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,989.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation $1,989.50, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO., INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7112. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $16,798.50 in connection with two shipments of grapes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California 94111. Respondent, Beacon Produce Co., is a corporation whose address is 401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $16,798.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $16,798.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

RONALD J. BALL and ALFRED V. BALL, d/b/a BALL BROS. PRODUCE, COMPANY *v.* BEACON PRODUCE CO., PACA Docket No. 2-7115. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $18,737.50 in connection with the shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant is a partnership composed of Ronald J. Ball and Alfred V. Ball, d/b/a Ball Brother Produce Company whose address is P. O. Box 69, Lewisville, Idaho 83431. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $18,737.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $18,737.50, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J. A. WOOD CO. - VISTA, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7123. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,336.50 in connection with shipments of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, J. A. Wood Co. - Vista, Inc., is a corporation whose address is P. O. Box 9069, Phoenix, Arizona 85068. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,336.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,336.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7124. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,125.00 in connection with two truckloads of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Nick Delis Company, Inc., is a corporation whose address is P. O. Box 1089, Millbrae, California 94030. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $2,125.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation $2,125.00, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J. A. WOOD CO. - VISTA, INC., a/t/a J. A. WOOD CO., *v.* BEACON PRODUCE CO., PACA Docket No. 2-6860. Decided June 2, 1986

Contract terms changed—protection for labor and shrinkage—deductions reasonable—reparation awarded.

The evidence is clear that complainant granted respondent protection for labor and shrinkage after the cantaloupes arrived in a deteriorated condition. Responde

thus sustained its burden of proving that the original contract terms were changed to reflect this grant of protection. Respondent's deductions for labor and shrinkage were reasonable considering the condition of the cantaloupes. Respondent, therefore, held without liability to complainant.

Andrew N. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Michael Paul Shienvold, Esquire, Fort Lauderdale, FL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,910.35 in connection of the sale and shipment of a trucklot of cantaloupes and green onions to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be a part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, J. A. Wood Co. - Vista, Inc. a/t/a J. A. Wood Co., is a corporation whose address is P. O. Box 9069, Phoenix, Arizona.

2. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately October 30, 1984, complainant sold to respondent a trucklot of cantaloupes and green onions. The contract price for the 756 cartons of cantaloupes was $7.00 per carton, plus $.80 per carton for cooling and palletizing. The contract price for the 75 cartons of green onions was $5.95 per carton, plus $.65 per carton for hydrocooling, and $8.00 for top ice. An additional $124.65

was charged for brokerage, for a total contract price of $6,524.45 f.o.b. for both commodities. John M. Baum, Atlantic Beach, Florida, acted as the broker in the proceeding, and both parties communicated through him.

4. The truckload of cantaloupes and green onions was shipped by complainant in interstate commerce to respondent, where it arrived on November 5, 1984, and was subjected to a federal inspection. The inspection found no condition problems with the green onions, but with respect to the cantaloupes found as follows:

> VARIOUS CONTAINERS Range 38° *To 42°*
>
> SHIPPER: J. A. Wood
>
> Cantaloupes—"Copperhead Brand" marked to denote count (15's 18's and 23's noted).
>
> Applicant States 210 ctns 15, 420 ctns 18's, 126 ctns 23's.
>
> CONDITION: Firm. Green color. Decay in most cartons 1 to 5 melons (6 to 22%) in some none, average 10% mostly Cladosporium Rot, some Fusarium Rot.

5. After receiving the inspection results, respondent contacted the broker and complained about the condition of the cantaloupes. The broker contacted complainant's employee, Jake McManus, and informed him of the condition problems. Mr. McManus agreed to grant respondent protection for labor and shrinkage on the cantaloupes. That same day, the broker sent a letter to complainant, with a courtesy copy to respondent, stating as follows:

> This will confirm our conversation with Mr. Jake McManus on 11/5/84, in which it was agreed that you are granting Beacon Produce Company, Pompano Beach, FL, protection for labor and shrinkage on 756 cantaloupes, shipped 10/31/84, via Jim McDonald Truck. Account USDA inspection 11/5/84, Pompano Beach, FL, shows temperatures 40-42°; *range 1-5 melons per carton in most samples (6-22%) some more, average 10% damage by cladisporium [sic] and fusarium rot.*

6. Respondent eventually paid complainant $2,614.10 for the green onions and cantaloupes. Along with its payment, respondent sent copies of the November 5, 1984, inspection and subsequent November 29, 1984, federal inspection of 297 cartons of cantaloupes showing 100% decay. Respondent also sent a statement explaining its deductions. The statement indicated that respondent had deducted $1.00 per carton, or $756, for handling, $3,133.35 for the

value of 297 cartons of cantaloupes dumped at $10.55 per carton, and $21.00 for a dump certificate.

7. Respondent has failed to make any additional payment to complainant for the cantaloupes.

8. A formal complaint was filed on April 15, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent contends that after the truckload of cantaloupes and green onions arrived, and the cantaloupes were found to be in a deteriorated condition, complainant agreed to grant protection and handling. Complainant denies ever changing the original contract terms, claiming that when it received notice of the November 5, 1984, inspection results, the parties mutually agreed that at a later date, following sales, a settlement would be made if determined to be necessary. Complainant also alleges that the cantaloupes were mishandled, evidenced by the fact that 297 cartons were still on hand and needed to be dumped over three weeks after they arrived at respondent's place of business.

The first issue to be determined is whether the contract terms were changed to allow respondent protection for labor and shrinkage, as respondent claims. It is respondent's burden to prove that the contract terms were altered. *American Banana Co. Inc.* v. *Marvin Gray*, 41 Agric. Dec. 539 (1981). The record contains a letter to complainant from the broker dated November 5, 1984, stating that on that same date, pursuant to a discussion with complainant's Jake McManus, complainant granted respondent protection for labor and shrinkage on the cantaloupes (Findings of Fact 5). That letter also related that the November 5, 1984, inspection showed temperatures of from 40 to 42°F and decay in the

or any other significant evidence in this regard, we conclude that respondent has sustained its burden of proving it was granted protection for labor and shrinkage.

Respondent claims that it incurred expenses of $776.00 for resorting the cantaloupes, damages of $3,133.35 consisting of the contract price plus freight of the 297 cartons it had to dump, plus $21.00 for the cost of a dump certificate, totaling $3,910.35. Complainant argues that since 297 cartons of melons were not sold after three weeks and dumped, it is evident that respondent did not properly handle them. We believe that since the cantaloupes had been resorted, no more than 150 cartons should have been unsaleable. Respondent's damages are thus $3,910.35, less the contract price plus freight of $10.55 per carton for the 147 cartons it should have been able to resell, or $2,359.50, plus the charges for resorting and a dump certificate, totaling $3,156.50. Accordingly, complainant was entitled to receive the difference between the contract price of $6,524.45 and its damages of $3,156.50, or $3,367.95. Since respondent has already paid $2,614.10, it remains liable for an additional $753.85, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $753.85, with interest thereon at the rate of 13% per annum from December 1, 1984, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., v. EARLES J. SCHMUCKER, and WAYNE A. SCHMUCKER d/b/a SCHMUCKER'S POTATO STORAGE, PACA Docket No. 2-6907. Decided June 2, 1986.

Effect of broker's statements—meaning of f.o.b. prices, delivered sale as to grade and condition—modification of contract by consent of parties—liability for freight—reparation awarded.

Where parties disagreed as to terms of contract the broker's statements were determinative of the actual terms. Since contract was f.o.b. as to price and delivered as to grade and condition; respondent/receiver was liable for freight, but seller was responsible for deterioration while goods were in transit. Where complainant agreed to a modification of the contract without conditions, but asked for an inspection which it did not receive, it was still held to the terms of the modified contract.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $6,329.89 in conjunction with a shipment of a rail car of potatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto in which it denied the allegations contained in the complaint. Because the amount claimed as damages is less than $15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and respondent filed an answering statement. Although given an opportunity to do so neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Nick Delis Company, Inc., is a corporation with an address at P.O. Box 1089, Millbrae, California 94030.

2. Respondent, Earles J. Schmucker, and Wayne A. Schmucker, d/b/a Schmucker's Potato Storage is a partnership with an address at Route 2, West Unity, Ohio 43570. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 15, 1984, complainant sold to respondent a rail car of potatoes, free on board as to price with a delivered sale as to grade and condition. The load of potatoes consisted of 665 sacks of U.S. No. 1 White rose potatoes and 435 sacks of U.S. No. 2 White rose potatoes. A temperature recorder was also placed upon the rail car.

4. William Schaub & Company, Indianapolis, Indiana, acted as the broker with respect to this transaction. The broker issued an initial memorandum of sale which stated that the contract was "Price Arrival". The corrected memorandum showed that the price of the 665 sacks of U.S. No. 1 potatoes was $7.00 [illegible]

price of the 435 sacks of U.S. No. 2 potatoes was $6.00 per sack. Both memorandums showed "Fob prices, delivered sale as to grade and condition at destination."

5. The potatoes were shipped in interstate commerce, and arrived at respondent's place of business on or about May 25, 1984, where they were received and accepted by respondent. Upon receipt of the potatoes respondent complained that they were not in good condition. Such complaint was conveyed to the broker, which conveyed the complaint directly to the complainant along with respondent's request for protection for shrinkage and labor as a result of decay. Complainant agreed with the request of respondent for protection for shrinkage and labor, and asked for a Railroad Perishable Inspection Agency (RPIA) inspection.

6. Respondent sorted and repacked the potatoes, and provided to complainant an accounting which showed that there were 8,475 pounds of culls, which should have been No. 1 potatoes, but which it valued at half price, claiming a credit of $448.00; that extra labor incurred over and above normal labor for sorting was $188.00; that 345 hundredweight at an average price of $6.40 per hundredweight of potatoes were dumped for a total cost of $2,208.00; that the freight for those potatoes which were dumped deducted from the total freight charge was $1,225.00; that it took a price adjustment of $1,765.00; and that pursuant to a separate agreement between itself and complainant it was deducting $500.00 for additional freight, for a total deduction of $6,334.00. Respondent paid complainant $2,722.61 as the difference between the total claimed as a credit and the invoice price of $9,052.50 of complainant.

7. A formal complaint was filed in this proceeding on March 4, 1985. An informal complaint was filed on November 9, 1984, which was within nine months of the time the cause of action herein accrued.

CONCLUSIONS

This proceeding involves a dispute as to several aspects of the contract, as originally entered, and subsequently as modified by the parties. Complainant contends that the contract was free on board as to price, and delivered as to grade and condition. It contends that the price charged for the potatoes was $9.00 per sack for 665 sacks of U.S. No. 1 potatoes and $7.00 per sack for 435 sacks of U.S. No. 2 potatoes, plus $22.50 for a temperature recorder, for a total contract price of $9,052.50. Respondent, on the other hand, contends that the price to be charged by complainant was $7.00 per sack for the U.S. No. 1 potatoes and $6.00 per sack for the U.S. No. 2 potatoes. Complainant also contends that although it accepted re-

spondent's assertions upon its receipt of the potatoes that there was considerable decay, it only agreed to provide respondent protection for shrinkage because respondent is a repacker, and would have to repack the potatoes in any event. Respondent contends that it asked for and received protection both for shrinkage and labor. Complainant also claims that respondent deducted $500.00 more for freight than it should have from its final accounting, which $500.00 was not authorized as a deduction by complainant. Finally, complainant contends that it asked for a Railroad Perishable Inspection Agency inspection, and that respondent failed to provide it sufficient evidence as to the condition of the potatoes based upon such asserted inspection, as a result of which respondent has not proved its damages.

Insofar as the terms of the contract are concerned we accept the statement of William Schaub & Company, the broker for this transaction, because as an ostensibly neutral third party its testimony must be given great weight. *Homestead Tomato Packing Co.* v. *Mims Produce, Inc.*, 43 Agric. Dec. ___ (1984); *Kern Ridge Growers* v. *T.J. Power & Co.*, 48 Agric. Dec. 425 (1981). The broker issued two broker's memoranda for this transaction. The first memorandum did not contain any prices, and stated the contract was "Price Arrival". The second memorandum, which contained the notation "CORRECTED COPY", stated that the prices for the potatoes were $7.00 per sack for the U.S. No. 1 potatoes and $6.00 per sack for the U.S. No. 2 potatoes. It also stated that the freight charge was $3,413.00. Both memoranda also stated that the terms of sale were "Fob prices, delivered sale as to grade a condition at destination". We accept the corrected memorandum of the broker as properly reflecting the terms of sale for the transaction in issue herein. Therefore, we conclude that the price for the U.S. No. 1 potatoes was $7.00 per sack and the price for the U.S. No. 2 potatoes was $6.00 per sack. We also conclude that the original freight charge was $3,413.00.

7 CFR 46.43(dd) is important to a resolution of the meaning of the terms "fob prices, delivered sale as to grade and condition at destination". That provision states:

> "F.O.B. inspection and acceptance arrival" means that the produce quoted or sold is to be placed by the seller free on board car or other agency of through transportation at shipping point, *the cost of transportation to be borne by the buyer*, but the seller to assume all risks of loss and damage in transit not caused by the buyer, who has the right to inspect the goods upon arrival and to reject them if, upon

> such inspection, they are found not to meet the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. *Such a sale is f.o.b. only as to price and is on a delivered basis as to grade, quality, and condition.*" (Emphasis added)

Although the language contained in 7 CFR 46.43(dd) is not exactly the same as the language contained in the broker's memorandum we are drawn to the conclusion that this is what the broker meant because the language "f.o.b. inspection and acceptance arrival" plus the emphasized statements contained thereafter are so close in meaning to the language "f.o.b. prices, delivered sale as to grade and condition at destination." Therefore, we find that the respondent is liable for payment of the transportation costs, and that the prices set forth by the broker are the prices agreed upon between the parties. We further find that the complainant was responsible for any deterioration in grade, quality or condition during the period of transit. As a result respondent had a right to reject the goods on arrival if it found that they did not meet the specifications in the contract of sale. Respondent did not do so. Rather, as shown by the broker's statement, the respondent asked for protection as to both shrinkage and labor. According to the broker complainant agreed to grant such protection. Therefore, it is liable for any costs incurred by respondent with respect to shrinkage or labor.

Although complainant asked for a Railroad Perishable Inspection Agency inspection, and respondent gave it a handwritten piece of paper without date which purported to contain to results of such an inspection, we cannot give credence to that document because it lacks a date, and was not otherwise properly identified as being and actual Railroad Perishable Inspection Agency report. This, however, makes no difference since complainant accepted respondent's request for a modification of the contract, and guaranteed it protection with respect to labor and shrinkage. Insofar as complainant's argument that it would never grant protection with respect to labor is concerned because respondent is a repacker, we reject the claim. Respondent made it clear that it did not claim for normal repacking. Rather it claimed for extra labor charges incurred in the amount of $188.00 above and beyond those which were usual for repacking.

The 665 sacks of No. 1 potatoes at $7.00 per sack came to a total price of $4,655.00. The 435 sacks of U.S. No. 2 potatoes at $6.00 per sack came to a total price of $2,610.00. To those prices should be added $22.50 for a temperature recorder for a total contract price for the potatoes of $7,287.50. As stated above respondent is respon-

sible for the payment of the freight. Therefore, respondent may not deduct the freight costs from the total contract price. Respondent had the burden to show that there was an agreement with respect to an adjustment for freight, and because there was no evidence other than its bald statement that complainant and respondent had such an agreement, we find it did not sustain that burden. We find that respondent's deduction of $448.00 for 8,475 pounds of culls which should have been No. 1 potatoes, but which it valued at half price, warranted a credit in that amount. We find that respondent did incur extra labor in the amount of $188.00 for sorting the potatoes. We also find that its accounting with respect to 345 hundredweight of potatoes which were dumped at $6.40 per hundred weight for $2,208.00 was reasonable. As damages respondent is also entitled to deduct the cost of freight with respect to the dumped potatoes. It computed this cost $1,225.00. However, that calculation was based upon a total freight charge or $3,913.00. We find that the total freight charge in this case which has been proved was $3,413.00. 435 hundredweight is 31.4 percent of 1,100 hundredweight. 31.4 percent of $3,413.00 is $1,071.68. That is the total amount of freight which may be deducted as damages for the dumped potatoes. Therefore, from the total contract price of $7,287.50 there should be deducted $448.00 for culls, $188.00 for labor, $2,208.00 for dumping, and $1,071.68 for freight, for a total deduction of $3,915.68, leaving $3,371.82 as respondent's total obligation with respect to this load of potatoes. Respondent has paid complainant $2,722.61 previously, leaving $649.21 which respondent has not paid complainant. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded, with interest thereon.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant $649.21 with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC., *v.* CORGAN & SON, INC., PACA Docket No. 2-6885. Decided June 5, 1986.

Contract terms—f.o.b. terms supported by evidence rather than open price, price after sale, consignment—burden of proof on buyer to show breach of warranty and damages—breach of warranty not proven by buyer—reparation awarded.

Where the evidence supported the seller's contention that f.o.b. terms were in effect for all six loads of lettuce, and respondent failed to sustain its burden of proving a breach of warranty regarding these loads, respondent is liable for the unpaid contract price.

Andrew N. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $13,958.28 in connection with the sale and shipment of six truckloads of lettuce to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which failed to file an answer thereto, and was held in default. The default was subsequently set aside and respondent filed an answer to the complaint, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Neither party submitted any additional evidence. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Fresh Western Marketing, Inc., is a corporation whose address is P.O. Box 5275, Salinas, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. From October 12, 1983, through December 24, 1983, complainant sold and shipped to respondent, in interstate commerce, six truckloads of lettuce on an f.o.b. basis. Bills of lading were prepared for each load, reflecting the quantity, truck number (except for the October 12, 1983, sale), and desired temperature range of 33°F to 36°F. The terms of sale and shipment for each load were as follows:

Date of Sale	Number of Cartons	F.O.B. Price	Truck Number
October 12, 1983	324	1,863.00	Not Listed
November 11, 1983	875	11,068.75	CABT03628
November 16, 1983	900	6,097.50	CRSZ550011
November 26, 1983	902	6,683.82	VA132012
November 30, 1983	1250	9,585.00	SFRC56002
December 24, 1983	825	8,916.25	CRAZ520629
	Total	$44,214.32	

4. All six truckloads were accepted by respondent upon their arrival at its place of business.

5. On October 20, 1983, respondent had the October 12, 1983, load federally inspected, which resulted as follows:

Products Inspected: LETTUCE, Iceberg type in cartons branded "Green Crest 2 doz. heads, California Coastal Farms, Inc., Salinas, California". Applicant States: 324 cartons.

. . .

Temperature of Product: Ranges 37 to 38F.

Condition: Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper Leaves:* No decay. *Head Leaves:* 1 to 3 heads per carton, average 9% damage by discoloration following bruising scattered throughout pack. 2 to 4 heads per carton, average 13% Bacterial Soft Rot in various stages affecting 1 to 2 leaves.

Remarks: Applicant states stock unloaded from AT-91328CA.

6. On November 15, 1983, respondent secured a federal inspection of what it claims to be the November 11, 1983, load. The inspection found as follows, in relevant part:

INITIAL & NO. IMSZ560123

VARIOUS CONTAINERS Range 38° *To 39°F.*

Lettuce Iceberg type in cartons branded "King O' Hearts Lettuce 2 Doz. Heads CA".

Applicant states 875 cartons.

Wrapper Leaves: Average 2% Decay.

Head Leaves: 1 to 2 heads in most cartons none in some average 5% damage by discoloration following bruising. 1 to 4 decayed heads in most cartons, none in many average 8% Bacterial Soft Rot in various stages affecting from 1 to 2 leaves.

REMARKS Inspection restricted to initial 100 cartons being unloaded and in 2 incomplete stacks nearest rear doors.

7. On November 22, 1983, complainant had the November 16, 1983, load federally inspected. The inspection revealed as follows, in relevant part:

INITIAL & NO. CRSZ550011

VARIOUS CONTAINERS Range 40 To 43°*F.*

LETTUCE, Iceberg type "King O' Hearts, 2 dozen heads."

Applicant states: Approximately 500 cartons remaining on van.

Condition: 1 to 5 heads in most cartons, none in some, average 9% damage by Tipburn. 2 to 8 heads per carton average 20% Bacterial Soft Rot in various stages affecting 1 to 4 leaves mostly following Tipburn.

REMARKS Restricted to approximately 300 cartons being unloaded at time of inspection and 5 stacks nearest rear doors.

8. On December 12, 1983, respondent had the November 30, 1983, load federally inspected. The inspection revealed as follows, in relevant part:

INITIAL & NO. SFRC56002

VARIOUS CONTAINERS Range 38° *To 39°F.*

Lettuce, Iceberg type in cartons branded "King O' Hearts 2 Dozen Calif."

Applicant states approx. 700 cartons.

Condition: *Wrapper Leaves:* No decay. *Head Leaves:* 1 to 3 heads in most cartons none in some average 6% damage by Russet Spotting. 1 to 7 heads per carton average 15% damage by tipburn. 1 to 4 decayed heads in most cartons none in many average 7% Bacterial Soft Rot in various stages affecting 1 to 2 leaves.

* * * * * * *

REMARKS Inspection restricted to approximately 125 cartons being unloaded at time of inspection and in 2 incomplete stacks each end of car in that portion of load remaining at time of inspection.

ary 4, 1983, complainant had the December 24, 1983, inspected. The inspection found as follows, in rele-

AZ570629

* * * *

Restricted to approximately 100 cartons being unloaded at time of inspection and in 2 incomplete stacks nearest rear doors.

* * * * * * *

TEMPERATURES 42 to 44°*F.*

10. Respondent has paid complainant a total of $30,256.04 for the six loads, consisting of $624.54 for the October 12, 1983, load, $7,568.75 for the November 11, 1983, load, $4,297.50 for the November 16, 1983, load, $6,314.00 for the November 26, 1983, load $5,835.00 for the November 30, 1983, load, and $5,616.25 for the December 24, 1983, load. Respondent has failed to pay any part of the $13,958.28 which complainant claims is still due and owing for the six truckloads.

11. An informal complaint was filed on April 23, 1984, which was within nine months from when the causes of action herein accrued. A formal complaint was filed on December 4, 1984.

CONCLUSIONS

Respondent denies liability, claiming that the six loads of lettuce it admittedly received and accepted were severely deteriorated, and respondent was thus justified in remitting to complainant only the net proceeds obtained on resale. Respondent contends that after it informed complainant of the condition problems, complainant agreed to allow it to handle the November 11, 1983, and November 16, 1983, loads on consignment. Further, respondent contends that the November 13, 1983, load was sold on an open price basis, and the November 26, 1983, load had price after sale terms in effect.

The first issue to be resolved is that of the contract terms agreed to by the parties. In its sworn complaint, complainant asserts that f.o.b. terms were in effect for all six loads. Respondent's allegations that certain transactions had open price or price after sale terms are made in unsworn letters to the Department, which can be given little weight as evidence. We thus conclude that all six loads were sold on a f.o.b. basis. Respondent's contention that complainant agreed to a consignment for two loads after learning of the condition problems is set forth in an unsworn letter to the Department in which respondent states it was told to "do the best we could." As respondent's allegations are unsworn, they cannot be given significant weight. Further, we have stated in previous cases that language such as "do the best you can with it" does not constitute authorization for handling on consignment. *Relan Produce Farms* v. *Rushton & Co., Inc.*, 38 Agric. Dec. 1686 (1979).

Since respondent admittedly received and accepted the six loads of lettuce, it became liable for the contract price minus damages resulting from any breach of warranty, which respondent has the burden of proving by a preponderance of the evidence. *Growers Exchange, Inc.* v. *Central Carolina Grocers, Inc.*, 42 Agric. Dec. 666 (1983). As we have determined that these were f.o.b. sales, complainant gave the implied warranty of suitable shipping condition, which, as stated in 7 CFR 46.43(j), "in relation to direct shipments, means that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." Respondent has submitted inspection reports which it contends prove that complainant breached its warranty with respect to five out of the six truckloads of lettuce. However, examination of these inspection reports does not bear out respondent's contentions.

The October 20, 1983, inspection of the October 12, 1983, shipment shows nine percent damage by discoloration following bruising and 13 percent decay, but was taken eight days after shipment. This is two to three days longer than the normal transportation time from complainant's location in Salinas, California, to respondent in Bronx, New York. We find that transportation conditions in this load were therefore abnormal, which voided the suitable shipping condition warranty.

The record contains a November 15, 1983, inspection, which respondent claims covers the November 11, 1983, shipment. However, the bill of lading for the 875 cartons shipped on November 11, 1983, shows that they were loaded onto truck number CABT03628, and the November 15, 1983, inspection submitted by respondent shows the 875 cartons inspected on truck number IMSZ560123. This casts doubt as to whether the lettuce inspected was the same as was loaded onto the truck by complainant. In any event, the inspection report make clear that the inspection was restricted to only 100 cartons being unloaded and two incomplete stacks nearest the rear doors. This is a small percentage of the 875 cartons contained in the load and cannot be considered to reflect the condition of the entire load. Therefore, no breach of warranty has been established by respondent for the November 11, 1983, load.

The November 22, 1983, inspection, which respondent secured on the November 16, 1983, shipment, was also restricted, as only 500 of the 900 cartons remained in the truck at the time of inspection, and the report states that the inspection was limited to only 300 cartons being unloaded and five stacks nearest the rear doors. Further, the pulp temperature was 40 to 43°F, which is too high and

evidences improper handling by respondent. We thus do not accept the November 22, 1983, inspection as an accurate representation of the condition of the lettuce when it arrived at respondent's place of business, and find no breach of warranty by complainant.

There is no evidence of any inspection having been taken on the November 26, 1983, truckload, and we have held that this was an f.o.b. sale rather than a price after sale, as respondent contends. Therefore, respondent is liable for the contract price.

The record contains an inspection report dated December 12, 1983, covering the November 30, 1983, truckload. The 12 day span of time between the shipping date and the date of inspection is much too long and renders the inspection results completely without evidentiary value. Even if the inspection had been timely, the report makes clear that it was restricted to 125 cartons and two incomplete stacks out of the 1,250 cartons shipped, an insignificant percentage. There is no credible evidence of any breach of warranty in this transaction.

The January 4, 1984, federal inspection took place 11 days after shipment of the December 24, 1983, truckload, which is also an excessive period of time. Further, the inspection was restricted to only 100 cartons being unloaded at the time of inspection and two incomplete stacks nearest the rear doors, a small percentage of the 825 cartons contained in the December 24, 1983, truckload. Therefore, respondent has not proven a breach of warranty regarding this transaction as well.

We have concluded that respondent has failed to sustain its burden of proving a breach of warranty by complainant regarding any of the six shipments of lettuce at issue. Therefore, respondent was obligated to pay the entire contract price of $44,214.32 but paid only $30,256.04, leaving a balance due and owing of $13,958.28. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $13,958.28, with interest thereon at the rate of 13 percent per annum from February 1, 1984, until paid.

Copies of this order shall be served upon the parties.

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING, *v.* GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL, PACA Docket No. 2-6824. Decided June 12, 1986.

F.o.b. sale and acceptance following arrival—affirmative defenses not proven by a preponderance of the evidence—condition of produce on arrival must be proven by neutral inspection—damages not awarded on basis of speculative profits—reparation awarded.

Complainant sold and shipped to respondent several loads of produce on an f.o.b. basis. Respondent raised several affirmative defenses which were not proven by a preponderance of the evidence. In particular, respondent's claim that the produce arrived in poor condition was not supported by neutral inspections. Respondent's counterclaim was based on the alleged destruction of respondent's business by complainant's shipment of inferior product, and was found to be not proven. In addition the damages sought for the alleged destruction of respondent's business were stated to be speculative and therefore were not recoverable in any event.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $51,425.26 in connection with the shipment in interstate commerce of six truckloads of tomatoes, one partial truckload of bell peppers and pickling cucumbers, and one truckload of red bell peppers.

›y of the formal complaint was served upon respondent efaulted in the filing of an answer. Later respondent filed a to reopen after default, and such motion was served upon nant. Complainant did not object to reopening, and on May this proceeding was reopened, and a proposed answer presubmitted by respondent was ordered filed. Respondent's denied liability to complainant, and also included a coun- in the amount of $548,070 based in part on previous transwith complainant. Complainant filed a reply to the counterlenying any liability thereunder. The Department did not ›port of investigation.

›ugh the amount claimed in the formal complaint and coun- exceeds $15,000.00, the parties waived oral hearing, and rtened method of procedure provided in section 47.20 of the f Practice (7 CFR § 47.20) is applicable. Pursuant to this pro-

cedure, the verified pleadings of the parties are considered a part of the evidence in the case. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and Respondent filed an answering statement. Complainant did not file a statement in reply. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Kent W. Northcross, is an individual doing business as Northcross Distributing, whose address is Rio Rico Industrial Park, Nogales, Arizona. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, George Villalobos, is an individual doing business as Teksun Brand International, whose address is 1865 Decatur Drive, San Jose, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between February 23, and March 12, 1984, complainant sold to respondent and shipped from Nogales, Arizona to respondent in San Jose, California, six truckloads of tomatoes, one partial truckload of red bell peppers, and one partial truckload of mixed bell peppers and pickling cucumbers, for invoice prices totalling $73,981.25, f.o.b.

4. Respondent accepted all of the subject produce and has paid complainant a total of $12,997.59 therefor. In addition complainant has granted respondent allowances on the produce in the total amount of $14,216.40. There remains due and owing from respondent to complainant the sum of $46,767.26.

5. The formal complaint was filed on September 4, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent does not dispute the quantities of perishable produce which complainant alleges were sold to respondent, nor does respondent dispute the original invoice prices applicable to such produce. However, respondent set forth several affirmative defenses which he had the burden of proving by a preponderance of the evidence. See *NewMiller Farms* v. *Nicolls*, 36 Agric. Dec. 1230 (1977) and *Walker & Hagen Packing House* v. *Amato Bros. Tomato Distributors, Inc.*, 27 Agric. Dec. 1543 (1968). Respondent alleges that on arrival the produce did not conform to the quality agreed upon between the parties when the contracts for the produce were entered. Respondent alleges that it agreed to purchase "number one product" but that complainant shipped inferior product. Respondent further alleges that it refused to accept the commodities

as shipped, but at complainant's insistence agreed to receive th product "without obligation and without price." Respondent fu ther alleges that it has "refused to pay for said balance, because c the devastating consequences, complainant's product had upon m business." Respondent then sets forth a counterclaim based upo complainant's alleged destruction of its business, and the specula tive profits which respondent alleges its business would have real ized over the next three years. This claim is easily resolved since i was established many years ago that damages cannot be awarde based on speculative profits. *Heller Bros. Co. Inc.* v. *Associate Fruit Distributors of California,* 4 Agric. Dec. 1002 (1945).

The documentation relative to the eight shipments of produce no where indicates that there was an agreement between the partie that the produce was to be U.S. No. 1, or any other specified qual ity. Respondent has presented us with no credible evidence tha any such quality was agreed to. Furthermore respondent did no submit any federal inspection reports covering the produce, an has therefore failed to substantiate its allegations in regard to th poor condition or quality of the produce on arrival. See *Mutua Vegetable Sales* v. *Select Distributors,* 38 Agric. Dec. 1359 (1979). W find that respondent has failed to substantiate its allegations i regard to an agreement subsequent to arrival that the produce wa received "without obligation and without price". In addition w find that respondent accepted the produce and has not proven any breach of contract on the part of complainant. Accordingly, re- spondent is liable to complainant for the full purchase price of the produce, less the amounts already paid and the amounts of the ad- justments allowed by complainant, or a total of $46,767.26.

Respondent's counterclaim failed to demonstrate that complain- ant was responsible for the destruction of respondent's business. Neither did such counterclaim establish that any amount is due from complainant to respondent on the earlier transactions re- [illegible] to in such counterclaim. We find that the counterclaim [illegible] dismissed.

SUNNYSIDE PACKING COMPANY, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7141. Decided June 12, 1986.

Admission—Reparation awarded.

Kenneth H. Vail, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $804.00 in connection with a truckload of plums in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Sunnyside Packing Company, is a corporation whose mailing address is P. O. Box 828, Selma, California 93662. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $804.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $804.00 with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

D'ARRIGO BROS. CO. OF CALIFORNIA, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7142. Decided June 12, 1986.

Admission—Reparation.

Kenneth H. Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,576.00 in connection with two shipments of mixed produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, D'Arrigo Bros. Co. of California, is a corporation whose mailing address is P. O. Box 850, Salinas, California 93902. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,576.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,576.00 with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SONORA RANCHES, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7143. Decided June 12, 1986.

Admission—Reparation.

Kenneth H. Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,062.50 in connection with two truckloads of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Sonora Ranches, Inc., is a corporation whose mailing address is 9123 North Cave Creek, Phoenix, Arizona 85020. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,062.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,062.50 with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MERRILL FARMS, *v.* J. CARUSO PRODUCE, INC., PACA Docket No. 2–6371. Decided June 23, 1986.

F.o.b. sale—acceptance—suitable shipping condition—transportation conditions normal—damages for violation of seller's warranty—counterclaim granted.

Where all evidence showed that lettuce was not in suitable shipping condition when loaded on board van, damages awarded to buyer which accepted lettuce on arrival.

Andrew W. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $3,004.50 in connection with one transaction, in interstate commerce, involving lettuce, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any further liability to complainant. In addition, respondent counterclaimed against respondent in the amount of $2,336.00.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) has been followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement, and respondent filed a verified answering statement. Also, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Merrill Farms, is a corporation whose mailing address is P.O. Box 659, Salinas, California 93902.

2. Respondent, J. Caruso Produce, Inc., is a corporation whose mailing address is 14 South Water Market, Chicago, Illinois 60608.

3. At all material times, each party was licensed under the Act.

4. On or about February 17, 1983, in the course of interstate commerce, complainant, by oral contract, sold to respondent 840 cartons of lettuce at an f.o.b. price of $2.75 per carton plus 65 cents per carton cooling, 15 cents per carton brokerage, and $22.50 for a

Ryan recorder, for a total agreed f.o.b. price of $3,004.50. The contract was negotiated through Fry Distributing Co., Inc., 2840 South Ashland, Chicago, Illinois 60608. The lettuce was shipped on that same date from a loading point in Arizona to respondent in Chicago on board van No. AXXZ 595754 which is owned and operated by Agricultural Express of America, 3409 West Pershing Road, Chicago, Illinois 60632. The van arrived in Chicago on Sunday, February 20, 1983, at 4:15 p.m. CST. As Monday, February 21, 1983, was observed as a legal holiday by the merchants on the South Water Market in Chicago, respondent did not open for business until 3:00 a.m. CST, February 22, 1983. At that time, it received notification of the van's arrival from the Flash Delivery Co. which had picked up the trailer from the unloading ramp of the Agricultural Express of America, and was further notified that the van would be delivered to respondent's location as soon as the South Water Market Association's rules permitted.

5. An employee of respondent was sent to check the van prior to its being delivered to respondent's loading dock. Upon arrival, the employee was advised that the refrigeration motor on the van was not running, and that the motor was out of fuel. The Flash Delivery Co. was contacted concerning this matter and advised respondent that the refrigeration unit had been operating when the van was delivered to the South Water Market Association lot at 1:00 a.m. on the morning of February 22, 1983.

6. The Ryan recording tape indicates that the instrument operated for about 108 hours. Since the bill of lading indicates that the loading was completed at 4:55 p.m. on February 17, 1983, this would indicate that the Ryan operated until about 6:00 a.m. on February 22, 1983. The tape further indicated that the temperature on board van No. AXXZ 595754 started at 75°F., quickly rose to 95°F. within the first two hours, dropped to about 42°F. two hours thereafter, dropped to 40°F. eight hours after that, and dropped to 35°F. at the end of the first 24 hour period. For the next 82 hours, the temperature was maintained in a 35°F. to 37°F. range and, for the last two hours in which the Ryan recording thermometer was operating, the temperature slowly rose to around 41°F. or 42°F. The company which supplied the Ryan recorder, Ryan Instruments, Inc., P.O. Box 599, Kirkland, Washington 98033, subsequent to this trip, recalibrated it and notified respondent as follows:

> Ryan #342656 returned to our Kirkland plant on Feb. 24, 1983. Upon testing, it was determined that the temperature sensor was reading 3 to 4° *low throughout the entire*

temperature range. The chartdrive mechanism was accurate as to time. The hinge on the outer case was cracked.

I'd like to direct your attention to the 108 hour point of chart 82361. The dark markings at this point indicate the instrument sustained an impact, apparently while being removed from the vehicle. This impact appears to be responsible for the error factor noted in our testing. In view of this, the recording prior to the point of impact is an accurate reflection of temperatures encountered on the trip. If we may be a further assistance, please advise.

7. On February 22, 1983, at 8:50 a.m. CST, the lettuce on board van No. AXXZ 595754 was inspected while still on board the van which was located in the truck lot at the South Water Market in Chicago, Illinois. The inspection certificate issued thereafter (F 010523) indicates that the temperature control unit was not operating, that respondent had unloaded approximately 150 cartons of the total 840 cartons shipped, and that the pulp temperature of the lettuce was as follows: "Near ⅔ length of trailer: Top 70°F, 3rd layer 68°F, 4th layer 88°F, floor 63°F." The inspection certificate further indicates that the condition of the lettuce was as follows:

Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper leaves only;* [sic] Serious damage by decay, in most samples 2 to 12 heads, in many none, average 17%. *Head leaves;* [sic] Decay ranges from 12 to 24 heads per cartons [sic], average 83%, Bacterial Soft Rot, in advanced stages.

8. The load of lettuce was the subject of a second Federal inspection on February 24, 1983, at 1:05 p.m. CST. The inspection certificate issued thereafter (F 010668) indicates that the lettuce was inspected while on board the van which was located in the truck lot of the South Water Market in Chicago, Illinois, and that the temperature control unit on the truck was not running. The temperature of the lettuce is recorded as follows: "Rear doors: Top 78°F, 3rd layer 63°F., 4th layer 65°F., Floor 58°F. Rear ½ length: Top 59°, 3rd layer 68°, floor 55°F. Rear ¼ length: Top 54°, 3rd layer 64°, floor 60°F." In addition, the inspection certificate notes the condition of the lettuce as follows:

Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper leaves only:* Serious damages by decay, in most samples 2 to 16 heads, in some none, average 33%. *Head leaves:* Decay ranges from 3 to 24

heads per carton, average 57%, Bacterial Soft Rot, in advanced stages.

9. On February 24, 1983, the lettuce on board van No. AXXZ 595754 was dumped by the C. Post Disposal Service, 1439 South 58th Court, Cicero, Illinois 60650, at a cost of $300 to the respondent.

10. On February 24, 1983, the respondent sent complainant the following telegram at 1:09 p.m. EST:

> BE ADVISED AXXZ595754 ARRIVED IN DETERIORATED CONDITION PER USDA INSPECTION WE HAVE ATTEMPTED TO HAVE FUEL PUT IN REFRIGERATED UNIT WITHOUT SUCCESS. WE BELIEVE THE CONDITION OF THIS LETTUCE REQUIRES IT TO BE DUMPED AS IT HAS NO COMMERCIAL VALUE WE HAVE BEEN ATTEMPTING TO OBTAIN A DISPOSAL COMPANY TO TAKE THE LETTUCE TO DUMP BUT HAVE BEEN UNSUCCESSFUL SO FAR WE ACCEPT NO RESPONSIBILITY FOR THIS LETTUCE AND WILL HANDLE IT ONLY FOR THE ACCOUNT FOR WHOM IT CONCERNS FOR THE PURPOSE OF HAVING IT DUMPED AS SOON AS POSSIBLE FOR THE PURPOSE OF MINIMIZING THE LOSS. PLEASE BE GOVERNED ACCORDINGLY WE WILL KEEP YOU ADVISED.

11. The complainant sent the respondent the following telegram at 6:03 p.m. EST on February 24, 1983:

> RECEIPT IS ACKNOWLEDGED OF YOUR FEBRUARY 24, 1983 TELEGRAM IN REFERENCE TO VAN AXXZ 595754 SHIPPED FEBRUARY 17, 1983. PLEASE TAKE NOTICE THAT AT THIS TIME MERRILL FARMS DOES NOT CONSIDER CARUSO RELEASED FROM ITS RESPONSIBILITY OF THIS F.O.B. CONTRACT. FURTHER THE CONTRACT WILL STAY IN FORCE UNTIL DETERMINATION CAN BE FOR THE HIGH PULP TEMPERATURE AT DESTINATION. AS THIS WAS AN F.O.B. SHIPMENT ALL DOCUMENTS MUST BE RECEIVED TO DETERMINE WHERE LIABILITY SHOULD BE PLACED. UPON RECEIPT OF DOCUMENTS WE WILL REVIEW THIS MATTER SO IT CAN BE CONCLUDED PROPERLY.

12. The United States Department of Agriculture Market News Report for February 22, 1983, covering the Chicago wholesale

market indicates that the lettuce had a minimum value of $6 per carton, and that the prices were steady.

13. The formal complaint was filed on June 13, 1983, which was within nine months of when the cause of action herein accrued.

CONCLUSIONS

There is no dispute in this case about certain material facts, *viz*, that the parties entered into an agreement whereby complainant would sell respondent 840 cartons of lettuce for a total f.o.b. price of $3,004.50, that the lettuce was shipped by complainant, and that the lettuce was received and accepted by respondent. Accordingly, having accepted the lettuce, respondent became obligated to complainant for the full contract price less any provable damages. *Rocky Ford Dist. Co.* v. *Angel Produce,* 29 Agric. Dec. 93 (1970). The respondent has the burden of proof as to such matters. *The Growers-Shipper Pot. Co.* v. *Southw. Pro. Co.,* 28 Agric. Dec. 571 (1969). In this case, therefore, the respondent must prove that the complainant breached the parties' contract, and that it was damaged as a consequence thereof.

The respondent has alleged that the lettuce which complainant shipped was not of the quality called for by their contract. As this was an f.o.b. sale, the lettuce was to be placed on board the van by complainant, at the shipping point, in suitable shipping condition. 7 CFR § 46.43(i). This means that the complainant was obligated to load lettuce on board the van which would arrive at the contract destination without abnormal deterioration if the shipment was handled under normal transportation service and conditions. 7 CFR § 46.43(i). *R. C. Walter & Son* v. *Gatz,* 31 Agric. Dec. 655 (1972). Respondent has alleged that the complainant failed in this regard, and that the complainant breached its warranty of suitable shipping condition. As noted above, respondent has the burden of proof on this issue, *i.e.,* it must show that the lettuce showed abnormal deterioration upon arrival and that transportation conditions were normal. *Valley Packing Co.* v. *Nicholas J. Zerillo, Inc.,* 28 Agric. Dec. 1352 (1969). There is no dispute between the parties about whether the lettuce was abnormally deteriorated; the first Federal inspection, on February 22, 1984, makes that clear. Thus, the dispositive issue in this case is whether or not there were abnormal shipping conditions as was alleged by the complainant.

The only substantive evidence on transportation service and condition is the tape from the Ryan recording device.[1] However, the

[1] The record also contains the affidavit of complainant's salesperson who is based in California, and who claims the load was properly pre-cooled. Since the load was

Continued

efficacy of this evidence is in dispute. Respondent argues the tape proves that the temperature on board the van was normal; complainant argues that the device was damaged and it therefore proves nothing. However, substantial evidence in the record indicates that this device operated properly throughout the entire trip. There is evidence that it was damaged after having operated for 108 hours. Considering the indication, on the bill of lading, that the loading was completed on February 17, 1983, at 4:55 p.m., the Ryan device operated until about 6:00 a.m. on February 22, 1983. Since this was about the time when respondent's employees opened the van, we concluded that the damage to the device did not occur until an attempt was made to remove it from the van. Such a conclusion is consistent with that made by the Ryan Instruments, Inc., personnel who inspected the device shortly thereafter.

In view of the above, we conclude that the tape from the Ryan device properly recorded the temperature on the van. The tape showed that the temperature in the van was normal throughout the trip, *i.e.*, after the first few hours, the tape shows the temperature on board the truck to be about 36°F. This is exactly the temperature which the bill of lading required the air temperature to be.

In spite of this evidence to the contrary, complainant maintains, however, that the carrying temperature on the van was too high. However, since we conclude that the Ryan recording device was operating correctly throughout the trip, and the tape from the trip indicates that the temperatures were maintained in a proper order throughout it, we conclude that complainant's allegation is unsupported by any record evidence. The complainant is apparently relying on the result of the recalibration of the recording device subsequent to the trip to support its claim that the temperatures on the van were too high. However, Ryan Instruments, Inc., which recalibrated its device after the trip, indicated that, while at the time of the recalibration the device was recording temperatures 4°F. lower than the actual temperature, it was expected this fault was not in effect during the trip, but rather resulted from some damage which

shipped from Arizona, it is difficult to understand how this person was in a position to attest to this fact. Moreover, the evidence he points to, a sheet titled "Operator's Daily Report," which ostensibly is a report from the complainant's pre-cooler in inconclusive at best. In the worst light for complainant, the "Operator's Daily Report" supports respondent's contention that the lettuce was not properly pre-cooled since it only reflects that 600 cartons of "Merrill Farms" lettuce were cooled, while complainant shipped 840 cartons. The Ryan tape, *see* below, shows a sharp temperature rise after the lettuce was loaded. Such a rise could have occurred if complainant only pre-cooled 600 of the 840 cartons loaded on the van.

occurred in removing the device from the van at the 108 hour point. Even had the temperature range been 4°F. higher than was reported on the Ryan tape, this temperature of about 40°F. would not have been the primary cause for the pulp temperature of the lettuce to rise to a temperature range of 63°F. to 88°F. as is reflected on the first Federal inspection certificate issued on February 22, 1983. Even had the cooling device not been properly functioning for several hours before the lettuce was inspected, since the temperature in mid-February in Chicago is not likely to be very high, such a failure would not account for the high temperature of the lettuce (63°F–88°F) reflected at 8:50 a.m., February 22, 1983, federal inspection. On the basis of all of the evidence in the record, we find that there were no abnormal shipping conditions in effect during the trip. *James Macchiaroli Fruit Co.* v. *Thos. Caito Sons,* 21 Agric. Dec. 525 (1962).

Since we have found that there were no abnormal shipping conditions, the complainant's warranty of suitable shipping conditions is maintained in effect. Inasmuch as the condition of the lettuce upon arrival was so poor as to indicate that the lettuce which complainant loaded in the van was in unsuitable shipping condition, we must hold that complainant breached its contract with respondent. As a result thereof, respondent is entitled to damages. The measure of damages for breach of warranty as to accepted goods is the difference at the time and place of delivery between the value of the goods delivered and the value they would have had if they had been as warranted, together with incidental damages. U.C.C. section 2-714; *Ritepak Produce* v. *Green Grove Markets,* 29 Agric. Dec. 165 (1970). We may accept the market news price for lettuce on the date of delivery as the value of the lettuce if delivered as warranted. *Anaya Farms* v. *Produce Distributors,* 20 Agric. Dec. 58 (1961). That price was $6.00 per carton, or a total of $5,040.00 for the 840 cartons. The goods delivered, in the instant case, had no value inasmuch as the whole lot of lettuce had to be dumped. Respondent's damage is thus $5,040.00. The contract price for the 840 cartons of lettuce was $3,004.50. Respondent is thus due $2,035.50 ($5,040.00 less $3,004.50) plus the $300 cost of dumping the lettuce, or $2,335.50, from the complainant. Complainant's failure to pay respondent this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days of the date of this order, complainant shall pay respondent $2,335.50, as reparation, with interest thereon at the rate of 13 percent per annum from April 1, 1983, until paid.

Copies of this order shall be served upon the parties.

THOMAS G. VALENZUELA d/b/a T. G. VALENZUELA PRODUCE, *v.* TEDDY BERTUCA d/b/a TEDDY BERTUCA COMPANY, PACA Docket No. 2-6710. Decided June 23, 1986.

Consignment—breach of duty by respondent consignee—reparation awarded.

Where respondent accepted seven lots of cantaloupes on consignment from complainant, he breached his duty as a consignee by failing to provide accounts of sale and remit the net proceeds of the sales. Respondent's liability does not extend to loads where the evidence supports his claim that the cantaloupes were in very poor condition upon arrival at his place of business.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se.*
Barry Kirschner, Esquire, Tucson, AZ, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $26,178.19 in connection with the consignment of seven lots of cantaloupes to respondent in interstate and foreign commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent subsequently amended its answer and asserted a counterclaim in the amount of $6,321.39 in connection with the subject matter of the complaint. Complainant filed a reply, denying liability.

The amount claimed as damages exceeds $15,000.00 and respondent requested an oral hearing. Therefore, an oral hearing took place in Tuscon, Arizona, on November 19, 1985. At the hearing, only respondent was represented by legal counsel, as complainant elected to proceed without counsel. Three witnesses testified for complainant and six witnesses testified for respondent. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Thomas G. Valenzuela, d/b/a T. G. Valenzuela Produce, is an individual whose address is P.O. Box 2280, Nogales, Arizona. At the times of the transactions alleged in the counterclaim, complainant was licensed under the Act.

2. Teddy Bertuca d/b/a Teddy Bertuca Produce, is an individual whose address is P.O. Box 2896, Nogales, Arizona. At the times of the transactions alleged in the complaint, respondent was licensed under the Act.

3. On approximately January 22, 25, 28, 30, and 31, 1984, complainant, by oral contract, consigned to respondent seven loads of cantaloupes consisting of sizes 15, 18, 23, 30, 36 and 42. The contract provided that respondent was to receive a 10% commission after sale. Respondent also gave complainant a $20,000.00 cash advance.

4. The cantaloupes comprising the seven loads were shipped from Mazatlan, Sinaloa, Mexico, to the Mexican/American border on January 20, 1984 (hereinafter "transaction 1"), January 22, 1984 (hereinafter "transaction 2"), January 25, 1984 (hereinafter "transaction 3"), January 26, 1984 (hereinafter "transaction 4"), January 28, 1984 (hereinafter "transaction 5"), January 28, 1984 (hereinafter "transaction 6"), and January 29, 1984 (hereinafter "transaction 7"). Upon their arrival at the border, four of the loads were subjected to a federal inspection. Transaction 3 was inspected on January 28, 1984, and found to contain "1136 half crate . . . defects 22 to 50%, average 35%, including from 11 to 39%, average 26% decay. Pulp temperature 60 F." Transaction 5 was inspected on January 30, 1984, and found to contain "1088 half crate . . . defects 13 to 39%, average 22%, including 9 to 39%, average 19% decay. Pulp temperature 45 F." Transaction 6 was inspected on January 30, 1984, and found to contain "598 half crate . . . defects 4 to 22%, average 14%, including from 4 to 22%, average 11% decay. Pulp temperature 48 F." Transaction 7 was inspected on January 31, 1984, and found to contain "992 half crate . . . defects 11 to 28%, average 16%, including 3% bruises, 3% sunburn, 3% scars and in most samples none, in many from 6 to 11% average 3% decay. Pulp temperature 40 F."

5. The cantaloupes arrived at respondent's place of business, and were found to contain the following numbers of crates for each size of cantaloupe:

Date Received	Transaction No.	15's	18's	23's	30's	36's	42's	Total
1/22/84	1	0	78	285	64	120	1	548
1/25/84	2	0	113	564	96	218	0	991
1/28/84	3	0	203	671	87	175	0	1136
1/28/84	4	32	224	633	57	187	0	1133
1/30/84	5	0	0	597	0	0	0	597
1/30/84	6	24	367	356	60	281	0	1088
1/31/84	7	0	252	546	15	169	0	982

6. Respondent accepted the cantaloupes for handling on consignment and disposed of them, but never provided complainant with accounts of sale or returns from the sale of the consigned cantaloupes.

7. A formal complaint was filed on August 22, 1984, which was within nine months from when the causes of action herein accrued. A counterclaim was filed on June 5, 1985, in connection with the subject matter of the complaint.

CONCLUSIONS

The complaint concerns seven loads of cantaloupes which respondent agreed to handle on consignment for complainant's account. Complainant complains that he never received any accounts of sale or notice of problems, and has not been paid anything by respondent. It is respondent's position that the cantaloupes were defective and difficult to sell. Respondent contends that his net proceeds were less than the $20,000.00 it advanced to complainant and has filed a counterclaim for the difference.

Since respondent was handling the cantaloupes on consignment, he was obliged to adhere to the requirements of section 46.29(a) of the Department's regulations (7 CFR § 46.29(a)), which states as follows, in pertinent part:

> It is a violation of section 2 of the Act to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence or failure to perform any specification or duty, ex-

press or implied, arising out of any transaction subject to the Act.

Complainant, as the party alleging that respondent was in breach of duty as a consignee, has the burden of proving his allegations by a preponderance of the evidence. *John Livacich Produce, Inc. a/t/a Vista Sales* v. *Auster Company, Inc.*, 42 Agric. Dec. 657 (1983).

Complainant bases his case on a report of personal investigation prepared by two Department of Agriculture investigators, which is in evidence in this proceeding. The report states that between May 10 and 16, 1984, the investigators examined respondent's records, and found that he had received 6,475 crates of cantaloupes from complainant. The investigators found that respondent had prepared recaps of sale for each load, but discovered that respondent's records of sales did not fully support his recaps. The investigators prepared an audit accounting, accepting only those sales supported by respondent's records. Where the sales evidenced by the records differed from the sales set forth in respondent's recap, the investigators raised or lowered the total number of crates to correspond with the quantity received by adding or subtracting crates at the average sales price for the crates for which there existed evidence of sales. The investigators reviewed all adjustments and credit memos to determine whether there was justification for any allowances granted. Adjustments granted due to condition problems were not allowed unless supporting evidence was found. All prices at less than one dollar per crate which respondent claimed to have ived were eliminated.

That inspection (respondent's exhibit 22) revealed an average of 26% decay and a pulp temperature of 60°F. (Finding of Fact 4). Mr. Mandel also testified to an inspection that allegedly occurred at the border on transaction 4, but the inspection report upon which he based his testimony, respondent's exhibit 23, on close examination is merely a photocopy of respondent's exhibit 22, the inspection pertaining to transaction 3. Mr. Mandel testified concerning inspections of transaction 5, which found an average of 11% decay and a pulp temperature of 48°F., and transaction 6, showing an average of 19% decay and a 45°F. pulp temperature (Finding of Fact 4). These three inspection reports clearly indicate that the cantaloupes were severely decayed at the border. Transaction 7 was inspected at the border on January 30, 1984, which found a total of 16% damage including 3% decay, with a pulp temperature of 40°F. (Finding of Fact 4). Mr. Mandel explained (transcript at 172-173) that this inspection was much more restricted than the other border inspections and, therefore, the actual decay experienced by the load was much greater than that revealed by the inspection. However, there is nothing in the record to support this claim and we, therefore, will accept the inspection at face value.

The inspection reports provided to the Department after the investigators prepared their audit accounting establish that the cantaloupes in transactions 3, 5 and 6 were in extremely poor condition before respondent ever received them. We ordinarily consider the findings of the Department's investigators to be extremely strong evidence. However, the investigators were not shown any inspection reports by respondent at the time of their investigation. We are sure that the investigators would have taken these reports into account if they had been informed of their existence. Accordingly, we have considered these reports in our evaluation of the reasonableness of respondent's returns, and made appropriate adjustments in the audit accounting. The remaining transactions do not affect the audit accounting, as there is no evidence of border inspections of transactions 1, 2 and 4, and the inspection of transaction 7 does not show sufficient deterioration to warrant any alteration of the conclusions of the Department's investigators.

Respondent has also placed into evidence federal inspections allegedly taken at the places of business of respondent's customers. None of these inspections will be given any significant weight. Respondent's Mr. Mandel testified (transcript at 141) that with respect to transaction 2, a January 26, 1984, inspection was taken on 84 crates of melons at the place of business of Buttke-Klahr, Inc., Phoenix, Arizona, one of respondent's purchasers. However, respondent's returns from the sales to Buttke-Klahr, Inc., $1.80 per

crate for 42 crates of 18's and 42 crates of 23's, were accepted by the Department's investigators and are not disputed by complainant. Mr. Mandel testified (transcript at 163–164) that a February 2, 1984, inspection of 966 crates of melons at West Coast Produce Co., Inc., San Antonio, Texas (respondent's exhibit 20) which showed decay, covered melons from transaction 5. However, the February 2, 1984, inspection was of both 23's and 18's, and transaction 5 contained only 597 crates of 23's. Therefore, even assuming the 966 crates inspected included the 597 crates of transaction 5, we cannot determine from the inspection the degree of deterioration exhibited by the melons from transaction 5 alone. With respect to the February 2, 1984, inspection of 79 crates at Solari-Aliaga Co., San Francisco, California (respondent's exhibit 18), which Mr. Mandel testified covered melons from transaction 6 (transcript at 162), it is not necessary to subject that inspection to any substantial analysis, as it is evident from the border inspection of transaction 6 that the cantaloupes were in such poor condition that any reasonable disposition by respondent would be consistent with his broker's duty. With regard to the February 6, 1984, inspection taken at Serra Brothers Inc., Detroit, Michigan, Mr. Mandel claims that such inspection covered melons from transactions 3 through 7 (transcript at 163). We believe this inspection to be unnecessary to justify respondent's handling of cantaloupes from transactions 3 and 6, as the border inspections show they were substantially decayed before they arrived at respondent's place of business. We do not believe the February 6, 1984, inspection should be given any significant weight regarding transactions 4, 5 and 7 for several reasons. First, the identity of the cantaloupes inspected is called into question by the fact that the inspection covered 335 crates, and respondent's recaps of sales show that respondent received only 314 crates. In addition, the date of the inspection, February 6, 1984, is nine days after delivery of transaction 4 on January 28, 1984, eight days after delivery of transaction 5 on January 29, 1984, and seven days after delivery of transaction 7 on January 30, 1984. These time periods

We have not found any significant evidence of problems regarding transactions 1, 2, 4 and 7. We, therefore, accept the findings of the audit accounting as representing what respondent should have remitted to complainant for these transactions. However, we have concluded that the cantaloupes from transactions 3, 5, and 6 were in very poor condition upon arrival at respondent's place of business and we thus will analyze the audit accounting with this in mind.

The audit accounting for transaction 3 did not accept respondent's claim that eight crates of 18's and 164 crates of 23's were sold to Serra Brothers, Inc., for $.75 each, or $129.00; 42 crates of 23's, 72 crates of 30's, and 175 crates of 36's were sold to Solari-Aliaga for $.50 per crate, or $144.50; and 420 crates of 23's were sold to W. W. Rogers for $.75 per crate, or $315.00. The audit also did not accept respondent's claim that one crate of 23's was lost to General Produce on repacking and one was given to W. Fay as a sample. In view of the obvious poor condition of the melons from transaction 3, we accept all these claims as valid except for the one crate given as a sample, which is not associated with condition problems. For transaction 5, the audit accounting did not accept respondent's claim that he had to pay $.015 per crate on 547 crates of 23's sold to West Coast Produce, for a charge of $8.20, and received $.75 per crate for 41 crates sold to Serra Brothers Inc. for $30.75. While we accept respondent's returns of $30.75 for the crates sold to Serra Brothers, Inc., we cannot accept that the 547 cartons sold to West Coast Produce were completely without value. It is stated in section 46.22 of the Department's regulations (7 CFR § 46.22) that a dump certificate or other adequate evidence must be provided to prove that produce is without commercial value when more than 5% of a consigned load is dumped. While the January 30, 1984, border inspection shows that transaction 5 experienced severe condition problems, the degree of deterioration, 11% decay, was not so great to permit a conclusion that virtually the entire load of 597 cartons was completely without commercial value. Since the melons of transaction 6 were so greaty decayed at the border, we will accept respondent's returns for the sale to W. W. Rogers of two crates of 18's at $.75 per crate, or $1.50, 84 crates of 18's, 138 crates of 23's, 31 crates of 30's and 65 crates of 36's to Solari-Aliaga at $.50 per crate, or $159.00, and 24 crates of 15's and 5 crates of 23's to Serra Brothers, Inc., for $.75 per crate, or $21.75. Respondent also claims that he incurred a loss of $.015 per crate for 239 crates sold to West Coast Produce, for an indebtedness of $3.59, and had to dump an additional 64 crates of 23's and 55 crates of 36's. We will accept the returns alleged in transaction 6 from sales to Solari-

Aliaga and Serra Brothers, Inc. We will also accept the dumping in this load, as we believe the results of the border inspection, an average of 19% decay, are consistent with respondent's claim that 358 of the 1,088 crates in transaction 6 were completely without value. We will not allow respondent a claim of $3.59 for the 239 crates sold to West Coast Produce in the absence of any evidence explaining such a charge.

It is our conclusion that the audit account of sales prepared by the Department's investigators, as revised in accordance with the above analysis, is an accurate reflection of the obligations of the parties with respect to the seven loads of cantaloupes at issue. The audit account of sales found justification for the sale of only 22 crates of 15's for $374.00, with 34 crates unaccounted for. As we have accepted the $18.00 reported by respondent for the sale of 24 crates in transaction 6, we find that 46 crates sold for $392.00. This gives an average sales price of 8.5217391 for the ten remaining crates, or $85.22, for a total of $477.20. Regarding the 18's, the audit account of sales found sales of 657 crates for $9,173.54, but could not account for 580 crates. We have accepted respondent's claim that eight crates were sold for $6.00 in transaction 3, and that 239 crates were dumped and 86 crates sold for $43.50 in transaction 6. We thus find that 990 crates of 18's sold for $9,223.24. This gives an average sales price of $9.31640 for the 247 remaining crates, or $2,301.15, for a total of $11,524.39. Regarding the 23's, the audit account of sales found sales of 1,685 crates for $19,855.09, but could not account for 1,967 crates. We have accepted respondent's claims that in transaction 3, one crate was dumped, and 627 sold for $429.00; in transaction 5, 41 crates were sold for $20.75; and in transaction 6, 200 crates were sold for $72.75. We thus find that 2,560 crates sold for $20,417.59. This gives an average sales price of $7.975621 for the 1,092 remaining crates, or $8,709.38, for a total of $29,126.97. Concerning the 30's, the audit account of sales showed 358 crates sold for $3,535.50, but it could not account for 21 crates. It is not clear how the Department's investigators determined that only 21 crates were not accounted for, since the record indicates that 103 crates were reported sold at less than $1.00 per crate, which the investigators indicated they would not accept. We have accepted the validity of respondent's claims that in transaction 3, 72 crates sold for $36.00, and in transaction 6, 31 crates sold for $15.50, for a total of $51.50 for the 103 crates. Therefore, in order to determine what value to assign to the 21 crates, we will use the average sales price respondent obtained for the 103 crates of $.50 per crate, or $10.50. We thus find that the 379 crates of 30's sold for $3,535.50 plus $10.50, or $3,546.00. Regarding the 36's, the audit

account of sales accepted sales of only 446 crates for $2,500.60, but could not account for 704 crates. We have accepted respondent's claims that for transaction 3, 175 crates sold for $87.50 and for transaction 6, 55 crates were dumped while 65 crates sold for $32.50. We thus find that 741 crates sold for $2,628.60. This gives an average sales price of $3.5473684 for the 409 remaining crates, or $1,450.87, for a total of $4,079.47. There is no dispute over the $1.50 reported for the one crate of 42's. The revised audit accounting for all sizes of cantaloupes in the seven loads is thus $477.22 for the 15's, $11,524.39 for the 18's, $29,126.97 for the 23's, $3,546.00 for the 30's, $4,079.47 for the 36's, and $1.50 for the 42's, for total gross proceeds of $48,755.55. The Department's investigators allowed adjustments of $2,639.82, which leaves $46,115.73 as the adjusted gross proceeds. The investigators also found $15,768.80 in allowable expenses, which also should be deducted. In addition we must subtract a commission of 10% of the adjusted gross proceeds, or $4,611.57, which leaves net proceeds of $25,735.36. After deducting respondent's advance to complainant of $20,000.00 we are left with $5,735.36 as the net proceeds underreported and unpaid to complainant. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Respondent has filed a counterclaim which is based on the premise that the investigators' report was in error with respect to the seven transactions at issue, since all loads were in poor condition when they reached respondent. As we have determined, this is only the case with respect to transactions 3, 5 and 6 but not with respect to transactions 1, 2, 4 and 7. Therefore, respondent's counterclaim is dismissed.

Complainant is the prevailing party herein and is entitled to an award of fees and expenses in accordance with section 7(a) of the Act (7 U.S.C. § 499g(a)). Complainant has filed a claim for $1,650.00 to which respondent has objected. Complainant's claim consists of $900.00 for three trips to the Los Angeles, California, P.A.C.A. office, $600.00 for one trip to the Washington, D.C. P.A.C.A. office, and $150.00 for miscellaneous expenses. This claim will not be granted, as complainant has not shown that these expenses were "necessarily incurred in connection with the oral hearing." 7 CFR § 47.19(d)(2)(v). Further, complainant has not presented any receipts to support his claim.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,735.36, with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

F & J PRODUCE SALES, *v.* HDRLICKA DAIRY CATTLE INC., a/t/a HRDLICKA BROS. PRODUCE CO., PACA Docket No. 2-6900. Decided June 23, 1986.

Counterclaim not timely filed.

Respondent's counterclaim was found not to be derived from the subject matter of the complaint and, therefore, was not timely filed. Respondent has offered no other defense to the complaint and is thus liable for the amount alleged by complainant.

Andrew N. Stanton, Presiding Officer.
Charles M. Sanders, Tampa, FL, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award of $11,125.52, which has since been amended to $10,459.46, in connection with the sale and shipment of three truckloads of watermelons to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent also filed a counterclaim and set-off in the amount of $13,230.47. Complainant filed a reply, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answer-

ing statement and complainant submitted a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, F & J Produce Sales, is a corporation whose address is P.O. Box 545, Lake Hamilton, Florida. At the time of the transaction involved in the counterclaim, complainant was licensed under the Act.

2. Respondent, Hrdlicka Dairy Cattle Inc., a/t/a/ Hrdlicka Bros. Produce Co., is a corporation whose address is Route 7, Box 142, Chippewa Falls, Wisconsin. At the times of the transactions involved in the complaint, respondent was licensed under the Act.

3. On June 5, 1984, complainant sold to respondent a truckload of watermelons at $5.00 per hundredweight, f.o.b., consisting of 43,280 pounds, for a total of $2,164.00. Complainant prepared an invoice (number 2017) containing this information and sent it to respondent, who never objected to the fact that the invoice purported to represent one distinct transaction.

4. The June 5, 1984, truckload was shipped in interstate commerce to respondent, where it arrived on June 8, 1984. Upon arrival, only 43,060 pounds of melons were accepted by respondent. Respondent has failed to pay complainant any part of the contract price for this truckload.

5. On June 21, 1984, complainant sold to respondent two truckloads of watermelons at $9.15 per hundredweight, delivered, consisting of 50,910 pounds and 47,030 pounds, for contract prices of $4,658.27 and $4,303.25, respectively. Complainant prepared invoices H120 for the 50,910 pound load and H121 for the 47,030 pound load, reflecting the contract terms, and sent them to respondent, who never objected to the fact that they purported to represent distinct transactions.

6. The June 21, 1984, truckload represented by invoice H120 was shipped in interstate commerce to respondent. When it arrived on June 23, 1984, respondent paid an unloading fee of $100.00 and accepted 46,398 pounds. Respondent has failed to pay complainant any part of the contract price for this truckload.

7. The June 21, 1984, truckload represented by invoice H121 was shipped in interstate commerce to respondent. When it arrived on June 25, 1984, respondent paid an unloading fee of $50.00 and accepted 45,910 pounds. Respondent has failed to pay complainant any part of the contract price for this truckload.

8. An informal complaint was filed on February 11, 1985, which was within nine months from when the causes of action alleged in the complaint accrued.

9. Respondent filed a counterclaim and set-off on June 24, 1985, which did not involve the transactions alleged in the complaint. The counterclaim was filed in excess of nine months from when the cause of action therein accrued.

CONCLUSIONS

In this complaint, complainant alleges that respondent is liable for the unpaid purchase price of three loads of watermelons sold to respondent in the amount of $11,125.52. Complainant has since amended its complaint to $10,459.46, taking into consideration the weight of the watermelons accepted by respondent and deducting the unloading fees charged respondent for the June 21, 1984, loads. Respondent admits purchasing, receiving and accepting these three loads, but claims that they were installments of one purchase made on June 5, 1984. Respondent alleges in its counterclaim and set-off that on June 5, 1984, it ordered three loads of watermelons scheduled for shipment on June 5, June 12, and June 21, 1984, and that complainant's improper handling of the June 12, 1984, load caused respondent to incur a substantial loss.

Respondent's counterclaim and set-off were filed along with its answer on June 24, 1985. Complainant claims that the counterclaim is not timely, as it was filed more than nine months after the alleged cause of action accrued in June 1984. Counterclaims not based on the subject matter of a complaint must be filed within nine months from when the causes of action thereof accrued. 7 CFR 47.3(a); *Bianchi & Sons Packing Co.* v. *Kelvin S. Ng d/b/a Kin Yip Company*, 42 Agric. Dec. 292 (1983). It is apparently respondent's position that the June 12 load and the three loads alleged in the complaint, were all part of one transaction entered into on June 5, 1984. Therefore, according to respondent, its counterclaim was based on the subject matter of the complaint, and thus within the Department's jurisdiction. However, the only evidence offered by respondent to support this is a sworn statement by Joseph Hrdlicka, its president, which is directly refuted by an affidavit from complainant's agent, R. W. Snyder, who insists that the complaint concerns three separate purchases; one made on June 5, 1984, and two others on June 21, 1984. The report of investigation contains copies of three invoices relating to the loads alleged in the complaint which appear to represent three distinct transactions. Respondent received these invoices, as they state thereon "reinvoice 10 JAN. 85", which implies that respondent was sent them on two occasions. In addition, respondent has included in its answering statement a copy of complainant's invoice for the June 5, 1984, shipment. Respondent does not deny having received these in-

voices, or allege that it objected to their representation of the watermelon loads as distinct transactions. Therefore, we conclude that the invoices accurately reflect the agreement between the parties that the three loads of watermelons set forth in the complaint were sold to respondent in three distinct transactions, and that the June 12, 1984, transaction alleged in the counterclaim was not one of these three transactions. As the counterclaim was not filed until June 24, 1985, in excess of nine months from when the alleged cause of action therein accrued in June 1984, the counterclaim is not within the Department's jurisdiction and must be dismissed.

Other than the allegations of this counterclaim, respondent has offered no defense to complainant's amended claims for the transaction of June 5, 1984, and the two transactions of June 21, 1984, in the amount of $10,459.46. Respondent is, therefore, liable for this sum, and its failure to make payment is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $10,459.46, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

The counterclaim and set-off is hereby dismissed.

Copies of this order shall be served upon the parties.

CRISP COUNTY VEGETABLE PACKERS, INC., v. DIAMOND-T PRODUCE CORP., PACA Docket No. 2-6631. Decided June 23, 1986.

Evidence—failure to submit sworn statement with knowledge of facts—payment allegations not rebutted—accounting for produce billed on an open basis deemed adequate—complaint dismissed.

Complainant claimed that respondent failed to pay in full for 12 shipments of produce. Respondent adequately demonstrated that payment had been made or was not due as to each of the shipments. Complainant failed to submit evidence by a party with knowledge of the facts and failed to otherwise adequately rebut respondent's allegations.

George M. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $22,294.62 in connection with the shipment in interstate commerce of numerous trucklots of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant in part, and admitting liability in connection with some of the transactions in the total amount of $5,583.62.

Although the amount claimed in the formal complaint exceeds $15,000, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Crisp County Vegetable Packers, Inc., is a corporation whose address is P.O. Box 352, Cordele, Georgia.

2. Respondent, Diamond-T Produce Corp., is a corporation whose address is P.O. Box 308, Pompano Beach, Florida. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about June 15, 1983, complainant sold to respondent, and shipped to respondent's customer, 78 cartons of small cucumbers at $6.65, and 752 cartons of super cucumbers at $8.25, or a total price of $6,722.70 f.o.b. Complainant billed respondent for this amount by its invoice number 624 dated June 22, 1983. Respondent has paid complainant $4,723.70 as an undisputed amount on this invoice.

4. On or about June 22, 1983, complainant sold to respondent, and shipped to respondent's customer, 850 cartons of super cucumbers at $5.00, or a total price of $4,250.00 f.o.b. Complainant billed respondent for this amount by its invoice number 810 dated June 22, 1983. This load was rejected by respondent on arrival, and such rejection was acquiesced in by complainant. Respondent does not owe any balance to complainant on this load.

5. On or about July 2, 1983, complainant sold to respondent, and shipped to respondent's customer, 200 cartons of super cucumbers at $6.25, or a total price of $1,250.00 f.o.b. Complainant billed respondent for this amount by its invoice number 821 dated July 2, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

6. On or about July 18, 1983, complainant sold to respondent, and shipped to respondent's customer, 200 cartons of medium Vidalia onions in 50 pound containers at $4.25, or a total price of $850.00 f.o.b. Complainant billed respondent for this amount by its invoice number 791 dated July 18, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

7. On or about July 25, 1983, complainant sold and shipped to respondent 296 cartons of fancy eggplants at $5.50; 9 containers of yellow squash at $8.50; 16 containers of zucchini squash at $4.00; and 8 containers of No. 2 yellow squash at $4.00; or a total of $1,800.50 f.o.b. Complainant billed respondent for this amount by its invoice number 794 on July 25, 1983. Respondent paid complainant in full for this load by check number 01251 on December 2, 1983.

8. On or about July 27, 1983, complainant sold and shipped to respondent 350 cartons of fancy eggplants at $5.00, or a total price of $1,750.00 f.o.b. Complainant billed respondent for this amount by its invoice number 797 dated July 27, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

9. On or about July 28, 1983, complainant sold and shipped to respondent, 350 cartons fancy eggplants at $4.00, or a total price of $1,400.00 f.o.b. Complainant billed respondent for this amount by its invoice number 808 dated July 29, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

10. On or about August 5, 1983, complainant sold and shipped to respondent 120 cartons of fancy eggplants at $2.00, or a total price of $240.00 f.o.b. Complainant billed respondent for this amount by its invoice number 813 dated August 18, 1983. Respondent paid

complainant in full for this load by its check number 01251 on December 2, 1983.

11. On or about August 10, 1983, complainant sold and shipped to respondent 25 cartons of fancy eggplants at $3.75, and 40 cartons of choice eggplants at $2.75, for a total price of $203.75 f.o.b. Complainant billed respondent for this amount by its invoice number 814 dated August 18, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

12. On or about November 24, 1983, complainant sold to respondent and shipped to respondent's customer, 158 cartons of super cucumbers; 77 cartons of select cucumbers; 188 cartons of fancy eggplants; and 55 cartons of small cucumbers; all on an open basis. Complainant billed respondent for this produce on an open basis by its invoice number 907 dated November 30, 1983. Respondent accounted to complainant for this load by showing total returns of $929.47, from which it deducted $119.50 commission, and $761.30 for freight, leaving a balance of $48.67 which it paid to complainant as an undisputed amount.

13. On or about November 30, 1983, complainant sold to respondent, and shipped to respondent's customer, 99 cartons of super cucumbers at $4.75, or a total of $470.25 delivered. Complainant billed respondent for this amount by its invoice number 908 on December 1, 1983. Respondent paid complainant in full for this load as an undisputed amount.

14. In connection with the shipment of a load of cucumbers by complainant to respondent on June 15, 1983, respondent secured complainant's permission to deduct $786.00 when making payment. However, respondent deducted the $786.00 amount twice. Respondent admitted making the double deduction, and has paid complainant the balance due as an undisputed amount.

15. The formal complaint was filed on February 24, 1984, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant's informal complaint concerns 12 invoices for product shipped between June 15, 1983, and September 29, 1983, having a total alleged value of $20,580.40. When complainant filed its formal complaint seven of the invoices which constituted part of the informal complaint were dropped, three were added, and nine remained the same. The formal complaint claimed a total of $22,294.62. However the transactions exclusive of the open invoice (see Finding of Fact 12) totalled only $19,723.20. Apparently complainant was claiming that the open invoice had a value of

$2,571.42. However, nowhere did complainant state how this figure was arrived at.

Complainant's formal complaint was subscribed and sworn to by H.E. Reynalds who signed himself as "Director" of complainant corporation. Respondent asserted in its answering statement that H.E. Reynalds was at no time involved in any of the negotiations or transactions between complainant and respondent, and that instead complainant was always represented by a Mr. James Oglesby. Complainant made no reply to this allegation, nor to any of respondent's other allegations in the answer or answering statement. Thus we are faced with a record which contains a sworn answer and a sworn answering statement by Glen C. Thomason, president of respondent, who claims to have been involved in all of the transactions, and no sworn statement by Mr. James Oglesby whom complainant apparently admits to have been the party that always represented complainant in the subject transactions.

In its sworn answer, respondent admitted liability to complainant in connection with several of the transactions, and subsequently paid complainant for these admitted amounts pursuant to an order of this Department. As to seven of the invoices (those covered by Findings of Fact 5 through 11) respondent claims that payment was made in full to complainant by its check number 01251 dated December 2, 1983. The copy of this check which was submitted as evidence in this proceeding shows that such check was in an amount more than adequate to cover the invoices which were the subject of Findings of Fact 5 through 11, and also shows that such invoices were specifically referenced on the face of the check. Since complainant has made no reply to respondent's allegation we have concluded that each of these invoices has been paid in full.

In regard to Finding of Fact 3 it is clear that respondent has paid complainant a balance of $4,723.70 after deducting a total of $1,999.00 for freight, storage, brokerage, and USDA inspections incurred in connection, not with invoice no. 624, but with invoice 810 which is covered by Finding of Fact 4. Respondent demonstrated that invoice 810 covered a load of cucumbers which was rejected by respondent on arrival. Respondent contends that the rejection was justified as shown by an USDA inspection, and that following rejection Mr. Oglesby asked respondent to help complainant place the load. Respondent maintains that it was unable to place the load, and that the original consignee, C.H. Robinson, in Dallas, Texas, stored the produce and subsequently dumped it. C.H. Robinson Co. charged back to respondent the storage fees, inspection fees, and freight charges. In addition to the invoice number 810 to respondent covering this load, the record also contains complainant's in-

voice number 683 to C.H. Robinson covering the same identical load of cucumbers. We conclude that respondent does not owe complainant any balance in connection with the produce covered by Finding of Fact 3 or Finding of Fact 4.

In connection with the produce covered by Finding of Fact 12, and complainant's invoice number 907, both parties agree that the produce covered by such invoice was billed on an open basis. Complainant did not submit any evidence concerning the fair market value of this produce. Although the accounting data which respondent has submitted in this proceeding in connection with this invoice is inadequate in that it does not give a per package breakdown of the gross sales of the produce, in view of complainant's failure to submit evidence of the fair market value of the produce, and in view of complainant's failure to respond to respondent's allegations, we find that respondent owes complainant no further balance in regard to this invoice.

In regard to the produce covered by Findings of Fact 13 and 14 respondent has admitted owing the amounts claimed by complainant, and has made payment in full pursuant to our order for payment of the undisputed amount.

We find that there is no balance remaining due by respondent to complainant on any of the produce covered by the complaint. Consequently, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

C.B. DISTRIBUTING CO., *v.* FRESHVILLE PRODUCE DISTRIBUTING, INC., PACA Docket No. 2-7149. Decided June 24, 1986.

of payment arrangement disputed.

Louis C. Pulvermacher, [illegible] Beach, CA, for complainant.

Louis C. Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $35,815.20 in con-

nection with shipments of melons in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant, except that respondent claimed the amount it owed to complainant was $30,592.20. Respondent further stated in its answer that payment arrangements had been made. Complainant was given an opportunity to dispute the fact that payment arrangements had been made and that the amount owed to it by respondent was $30,592.20. By letter dated May 13, 1986, and received by the department on May 15, 1986, complainant agreed that the amount owed to it was $30,592.20, but denied that payment arrangements had been made. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, A.T.B. Distributing Co., is a corporation whose address is P. O. Box 2683, Turlock, California 95381. Respondent, Freshville Produce Distributing, Inc., is a corporation whose address is 1367 Viele Avenue, Bronx, New York 10474. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $30,592.20. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $30,592.20, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon with the parties.

O&E GROWERS, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC., PACA Docket No. 2-7150. Decided June 24, 1986.

Liability admitted—payment arrangement claimed—disputed—Reparation.

Kenneth Vail, Presiding Officer.
Complainant, *pro se.*
Louis C. Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $23,852.25 in connection with shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Respondent further indicated in its answer that payment arrangements were being made with the complainant. Complainant was given until May 22, 1986, to dispute the fact that payment arrangements had been made. Complainant, in a letter dated May 12, 1986, and received by the Department on May 16, 1986, denied that any agreement as to payment arrangements had been made. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, O&E Growers, Inc., is a corporation whose address is P. O. Box 215, Elba, New York 14058. Respondent, Freshville Produce Distributors, Inc., is a corporation whose address is 1367 Viele Street, Bronx, New York 10474. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $23,852.25. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $23,852.25, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

WATSONVILLE PRODUCE, INC., *v.* WEINSTEIN PRODUCE SALES, INC., PACA Docket No. 2-7164. Decided June 24, 1986.

Admitted debt—Reparation.

Kenneth Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,727.65 in connection with two shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Watsonville Produce, Inc., is a corporation whose address is 38 Bluff Road, Watsonville, California 95076. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P. O. Box 7364, Boise, Idaho 83707. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $5,727.65. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,727.65, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

AGRI-PAK FRUIT CO., *v.* NICHO PRODUCE CO., INC., and/or SO. CENTRAL BROKERAGE, INC., PACA Docket No. 2-6723. Decided June 27, 1986.

Wrongful rejection—damages—duty of broker—reparation awarded.

Where truck arrived two days late and with high temperature, buyer in f.o.b. transaction did not have right to reject load of grapes. Complainant fails to prove that broker did not carry out his duties.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondents in the amount of $2,682.00 in connection with a transaction, in interstate commerce, involving grapes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on all parties. Each respondent also was served a copy of the complaint, and each filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. Complainant filed an opening statement, respondent So. Central Brokerage, Inc., filed an answering statement, and complainant also filed a statement in reply. In addition, respondent So. Central Brokerage, Inc., filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Don Davies, Charles Enoch, Dennis Vartan, and Lee Yeramian, doing business as Agri-Pak Food Company, whose mailing address is P.O. Box 399, Del Rey, California 93616.

2. Respondent Nicho Produce Co., Inc. ("Nicho") is a corporation whose mailing address is P.O. Box 1136, Edinburg, Texas 78539.

3. Respondent So. Central Brokerage, Inc., ("So. Central") is a corporation whose mailing address is 1500 South Zarzamora Street, San Antonio, Texas 78207.

4. At all material times, each respondent was licensed under the Act.

5. On or about October 25, 1983, in the course of interstate commerce, complainant by oral contract sold to Nicho 360 lugs, wrapped, U.S. No. 1, Thompson seedless grapes, labeled "WE-4," a perishable agricultural commodity, at an agreed f.o.b. price of $8.00 per lug, plus 70 cents per lug for precooling and palletization, for a total f.o.b price of $3,132.00. The transaction was brokered by So. Central. The grapes were shipped to Nicho as part of a truckload of grapes which the complainant had sold to three Texas buyers (including Nicho) through So. Central. On the same day as the sale of the grapes, October 25, 1983, So. Central issued a broker's memorandum, No. 6775-1083, which confirmed the multiple sales to the three Texas buyers and indicated that all three shipments were to be loaded on the same truck. The truckload of grapes was shipped by complainant to the three Texas buyers on October 25, 1983, the same day as the sales to them. The bill of lading required that the temperature in the truck be maintained at 36°F. There was no temperature recorder on the truck.

6. On October 31, 1983, or six days after they were shipped from California, Nicho received its partial truckload of grapes consisting of 360 lugs. As its employees unloaded the grapes, they noted that the grapes seemed to have problems and ceased unloading them. After speaking to employees of So. Central, Nicho called for a federal inspection. The inspection was conducted on October 31, 1983, at 3:35 p.m., at the location of Nicho. The inspection certificate issued thereafter, E 188251, indicates that, at the time of the inspection, the temperature controls on the truck were still in operation. It further indicates that the load was partially unloaded but that some of the grapes remained in the nose of the trailer. The temperature range of the grapes is noted as being 45°F to 46°F in the rear, and 44°F to 45°F for the grapes which were still loaded in the nose of the truck. The condition of the grapes was noted as follows:

> Berries mostly firm and firmly attached to capstems. In most lugs from 2 to 6%, in some 14%, average 6% shattered berries. Stems mostly turning brown, many brown and pliable. Average 2% sulfur dioxide injury. In most lugs from 2 to 6%, in some 13%, average 6% serious damage by discolored berries. Average 1% crushed and

leaking berries. Decay ranges from 1 to 4%, and 2% Gray Mold Rot in all stages.

7. Based on the inspection, Nicho told So. Central that it was rejecting the grapes. So. Central reported this to complainant, specifically to a Mr. Bob Stockton ("Stockton") with whom the broker had been dealing on these transactions. After being advised of the results of the inspection, and that the temperature of the grapes "was fine," Stockton accepted the rejection. Eventually, the grapes were handled on consignment by Boler Farms, Pharr, Texas. The latter company returned proceeds to complainant in the amount of $450.00 and also indicated that 200 of the 360 lugs were dumped.

8. The normal transit time between complainant's location and that of Nicho is four days.

9. An informal complaint was received by the Department on June 4, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case focuses on whether or not Nicho had the right to reject the load of grapes on arrival. The complainant's position is that, since this was a f.o.b. sale and Nicho undertook the risks of transportation, the high temperature of the grapes as shown on the federal inspection certificate indicates that it had lost this right. In an f.o.b. transaction, a buyer accepts the risk of abnormal transportation conditions. *J.J. Crosetti Co.* v. *Yeckes-Eichenbaum*, 30 Agric. Dec. 287 (1971); 7 CFR § 46.43(i). Thus, the existence of abnormal transportation conditions voids a shipper's warranty of suitable shipping condition. *Ventura* v. *Regan*, 31 Agric. Dec. 443 (1972).

In the instant case, there is evidence that the load of grapes was not handled under normal transportation service and conditions: first, it appears that the shipment took about 48 hours longer than normally expected to reach Nicho's location from that of complainant; [1] and second, the temperature of the grapes was higher than normal, *i.e.*, the bill of lading called for a temperature of 36°F. to be maintained en route, but the federal inspection reflected that the temperatures of the grapes ranged from 44°F to 46°F.[2] In view

[1] Pursuant to 7 CFR § 47.25(f), we take official notice of this fact which is a commercial fact of established character. *See* Finding of Fact 8.

[2] Respondents argue that the 44°–46°F. temperatures which the grapes showed upon Federal inspection occurred because the unloading of the grapes was stopped when their alleged deterioration was discovered, and the grapes sat for a considerable length of time awaiting the Federal inspector. This explanation does not satis-

Continued

of this, we hold that Nicho's rejection was without reasonable cause. *Ventura* v. *Regan, supra*, 31 Agric. Dec. 443. Cf. *R.C. Walter & Sons* v. *Gatz*, 31 Agric. Dec. 655 (1972), in which the rejection was determined not to be unreasonable where transit time was normal, and the low temperatures of the grapes indicated normal carrying temperatures.

The measure of damages where a shipment is rejected without reasonable cause is the difference between the contract price and the amount realized from resale, provided the resale is made in good faith and in a commercially reasonable manner. *See, C. J. Prettyman, Jr. Inc.* v. *J. K. Packing Co.*, 28 Agric. Dec. 1476 (1969); U.C.C. § 2-706. The contract price in the instant case was $2,682.00, and the complainant received $450.00 from the resale of the grapes. As there is no allegation or proof that this resale was not prompt or properly conducted, we hold the sale to have been made in good faith and in a commercially reasonable manner. Accordingly, we hold that Nicho is obligated to complainant in the amount of $2,232, or the contract price ($2,682.00) less the proceeds on resale ($450.00). Nicho's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Complainant alleged that So. Central failed to carry out its duties as a broker, however, there are no facts alleged or proven by complainant by which we could so conclude. In view of that, the complaint is dismissed against So. Central.

ORDER

Within 30 days from the date of this order, Nicho Produce Co., Inc., shall pay to complainant, as reparation, $2,232.00 with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid.

The complaint against So. Central Brokerage, Inc., is dismissed.

Copies of this order shall be served upon the parties.

factorily explain the high temperatures because the grapes which were still loaded on board the truck with the cooling unit operating registered virtually the same temperatures as the grapes which had been unloaded. Had there been a temperature recorder on board the truck, perhaps respondents could have been sustained their argument. However, apparently respondents chose not to use a recorder on the truck.

BODEGAS RANCHO SAN VALENTIN S. DE R.L., *v.* OTAY PACKING CO., PACA Docket No. 2-6809. Decided June 27, 1986.

Consignment sales—failure to keep adequate records—audit accounting by Department official basis for reparation award.

Respondent failed to keep adequate records of consignment sales. Department's audit revealed lack of documentation in form of federal inspections to support very low returns relative to current market price as to numerous sales. Audit accounting, which assigned price to these sales based upon average gross price or other sales, was made basis for award of reparation in complainant's favor. Respondent was given credit on two sales for which documentation was supplied after commencement of formal proceedings.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,060.66 in connection with the shipment in interstate commerce of 13 truckloads or partial truckloads of eggplants.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. However, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bodegas Rancho San Valetin, S. de R.L., is a corporation whose address is 3566 Bentley Drive, Spring Valley, California.

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about September 30, through November 5, 1983, complainant consigned to respondent to be sold for complainant's account 13 truckloads or partial truckloads of "Buty Hybrid" eggplants, of various sizes, all to grade U.S. No. 1. The eggplants were shipped from complainant's place of business in Mexico and were received by respondent at its receiving docks in Chula Vista, California.

4. Complainant's shipping manifests show a total of 10,574 cartons of eggplants shipped to respondent. Respondent's receiving records show receipt of a total of 10,572 cartons. Respondent rendered accountings to complainant showing the resale of 10,607 cartons of eggplants for gross proceeds of $48,128.95, and net proceeds of $34,990.50. Additional expenses in connection with the packing, transportation, and sale of the eggplants totaled $11,014.20. Respondent paid complainant total net proceeds, after all expenses, of $23,976.50.

5. A personal investigation was made by an employee of this Department at the place of business of respondent between September 24 and October 4, 1984. Such investigation disclosed that respondent had failed to keep adequate records in that "(1) the respondent's invoices did not indicate specific lots; (2) there was an overlapping of lots on hand; and (3) sizes shown shipped did not correspond with exact sizes received." The audit accounting found that the amount of $11,060.66 remained due to complainant as underreported and underpaid "due primarily to adjustments of the sales prices to eliminate prices which were unusually low without supporting papers to substantiate them, such as inspection certificates or dump certificates." The audit accounting disclosed that 3,815 cartons were sold at unusually low prices, below $2.25 per carton, and assigned to such cartons the average gross price of $5.604018, or a total of $21,379.33. The gross proceeds on the remaining 6,757 cartons were accepted as shown by respondent's records in the total amount of $37,866.35, for total gross proceeds of $59,245.68. Total expenses, including a 12% commission allowance, amounted to $24,208.72, leaving net proceeds of $35,036.96. Subtracting the amounts previously paid by respondent to complainant, a remainder was computed as still due in the amount of $11,060.66.

6. Respondent granted a credit to one of its customers, Horwath & Associates, Inc. of Rohnart Park, California on 420 cartons of eggplants shipped October 22, 1983, in the total amount of $2,029.00. This credit was not taken into account by the audit accounting, but was supported by a federal inspection. Respondent allowed an additional credit in the amount of $1,204.00 on 215 cartons of eggplants, also sold to Horwath & Associates Inc., and

shipped on October 24, 1983. This credit was also supported by a federal inspection.

7. The informal complaint was filed on December 7, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent maintains that it actually overreported to complainant the amounts which it realized from the resale of the eggplants. However, as disclosed by the audit of respondent's records by an investigator from this Department, respondent failed to keep adequate records, and in addition reported many sales which were far below market price levels without inspection certificates or dump certificates to support such sales. However, respondent, in its answer, supplied two inspection certificates to support credit allowances in the total amount of $3,233.00 in connection with the resale of 635 cartons of eggplants. Although these two inspections covered a smaller number of cartons than those on which respondent granted credits, the inspections disclosed quality defects averaging 12% in one case, and 14% in the other, with a high range in one case of 17%, and 22% in the other. The high range of defects in each case shows that the total lot of eggplants would be out of grade even though the inspection did not cover the total lot. We find that respondent has adequately supported the credits granted in the total amount of $3,233.00. We also find that due to respondent's general failure to support the extremely low sale prices with adequate documentation it is liable to complainant for the $11,060.66 balance which the audit accounting found due, less the

FINUCANE GILSON & FOSTER, INC., *v.* DEARDORFF-JACKSON COMPANY, PACA Docket No. 2-6831. Decided June 27, 1986.

Settlement.

Where parties renegotiated the price provision of a contract after arrival of produce, buyer cannot claim reimbursement from seller after it allows its customer a further price adjustment.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se.*
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $1,157.65 in connection with a shipment of strawberries in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The respondent filed a verified answering statement. It also filed a brief.

FINDINGS OF FACT

1. Complainant, Finucane Gilson & Foster, Inc., is a corporation whose mailing address is 3500 West 75th Street, Suite 100, Prairie Village, Kansas 66208.

2. Respondent, Deardorff-Jackson Co., is a corporation whose mailing address is 1120 Mountain View Avenue, Oxnard, California 93030. At all material times, respondent was licensed under the Act.

3. On or about April 4, 1984, respondent, by oral contract, sold to complainant 864 trays of strawberries at an agreed upon f.o.b. price of $4.50 per tray plus 60 cents per tray for cooling and palletizing,

$18.50 per unit for nine units of controlled atmosphere, and $11.25 for a recording thermometer, for a total f.o.b. price of $4,584.15. Respondent, in turn, sold the strawberries to the Fleming Companies, Inc. (Fleming), Topeka, Kansas 66601, for shipment to its establishment in Joplin, Missouri, for a price of $6.85 per tray plus $20.00 per unit for nine units of palletizing and artificial atmosphere, for a total f.o.b. price of $6,098.40.

4. Upon arrival in Joplin, Missouri, these strawberries were found, by a Federal inspector, to be somewhat deficient in quality. Respondent was contacted by the complainant and agreed to provide the complainant with protection against the handling of the strawberries by Fleming. Sometime thereafter, respondent's employees inquired of complainant as to the handling of the strawberries by Fleming. On or about May 1, 1984, complainant's employee, Earl Pearson, told respondent's salesman, David Cook, that Fleming was only seeking a $55.50 adjustment. Respondent agreed to permit complainant to deduct the same $55.50 from its invoice to complainant. Thereafter, complainant paid respondent's invoice less $55.50 or $4,528.65. Respondent accepted complainant's check in the amount of $4,528.65 as full and final settlement on the shipment of strawberries.

5. On or about May 8, 1984, complainant received notification from Fleming that it was deducting the cost of 169 trays of strawberries ($1,157.65) from its payment for an unrelated invoice.

6. The formal complaint was filed on November 26, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks reimbursement from respondent of $1,157.65 t allegedly overpaid respondent with respect to a transaction in nterstate commerce involving a shipment of strawberries. The alged overpayment occurred because Fleming, subsequent to an greement between the parties limiting an adjustment on the shipnent to $55.50, deducted a further $1,157.65 from an unrelated nipment claiming it as a further loss on the subject shipment of rawberries.

The evidence reflects that, on or about May 1, 1984, the parties negotiated their contract, and that, at that time, they agreed to a ew price which was $55.50 less than the original contract price. omplainant paid respondent the amount agreed upon ($4,528.65) the time, and respondent accepted it in full settlement of the irties' contractual agreement. Accordingly, complainant is preuded from seeking further damages from respondent as to this

shipment. *Bell City Brands* v. *Western Tomato,* 25 Agric. Dec. 402 (1966). Thus, the complaint should be dismissed.

ORDER

The complaint is dismissed.
Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

S. STAMOULES, INC., a/t/a STAMOULES PRODUCE CO., *v.* SOL SALINS, INC., PACA Docket No. 2-6795. Decided May 1, 1986.

Reconsideration—denied.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Howard Silberberg, McLean, VA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on March 7, 1986, awarding reparation to complainant in the amount of $1,008.00, plus interest. On March 17, 1986, respondent filed a petition for reconsideration. Pursuant to section 47.24(a) of the Rules of Practice (7 CFR § 47.24(a)), the filing of the petition automatically operated to set aside the Decision and Order pending final action on the petition.

In its petition, respondent argues that the Decision and Order erroneously concluded that an accord and satisfaction did not occur because respondent's check did not indicate that it was being offered in full satisfaction of the transaction for which it was given in payment. Respondent asserts that the evidence shows that when respondent gave its $5,012.10 check to complainant, complainant was in possession of an invoice which complainant had sent to respondent, who had returned it with the notation "less allowance per Geo. Depaoli" and a deduction of $1,008.00. Respondent claims that complainant therefore was informed from sources other than the check itself that such check was being tendered in full payment.

Respondent's argument is completely without merit. We have often stated that "the mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to

be indebted to him only to the extent of payment made, does not necessarily establish an accord and satisfaction. *Half Moon Fruit & Produce Company* v. *North American Produce Distributors, Inc.*, 40 Agric. Dec. 1610, 1613 (1981); *Louis Caric & Sons* v. *Ben Gatz Co.*, 38 Agric. Dec. 1486 (1979); *Mendelson-Zeller* v. *Season Produce*, 31 Agric. Dec. 1288 (1972). On two occasions, we held that an accord and satisfaction did not take place even though the creditor was informed in writing that the check was in settlement of the disputed transaction. *See, Half Moon Fruit & Produce Company* v. *North American Produce Distributors, Inc., supra; Horvitz Brothers* v. *David Goldsamt*, 20 Agric. Dec. 391 (1961). There was clearly no accord and satisfaction in this case.

ORDER

The reparation awarded in the March 7, 1986, Decision and Order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

ALFONSO CHECCHI, *v.* L&J PACKING, INC., PACA Docket No. 2-6813. Decided May 2, 1986.

Dismissal.

Allan R. Kahan, Presiding Officer.
Daniel L. Rudnick, Bakersfield, CA, for complainant.
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $73,408.77 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 4, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of April 4, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

LYN-DE FARMS, INC., *v.* TOM LANGE COMPANY, INC., PACA Docke No. 2-6986. Decided May 2, 1986.

Dismissal.

Ben Bruner, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,584.71 in connection with a transaction involving the shipment of cabbage in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 31, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 31, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PEMBERTON PRODUCE, INC., *v.* TOM LANGE COMPANY, INC., PACA Docket No. 2-7090. Decided May 2, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Matthew McInerney, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,066.50 in connection with

transactions involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 31, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 31, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DEW-GRO, INC., a/t/a CENTRAL WEST PRODUCE, v. SEE SUN HO KEE, INC., PACA Docket No. 2-7114. Decided May 5, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Constance L. Rudnick, Boston, MA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,952.50 in connection with a transaction involving the shipment of sugar peas in interstate commerce.

BARTON WILLOUGHBY d/b/a WILLOUGHBY FARMS, *v.* FRITO-LAY, INC., PACA Docket No. 2-6614. Decided May 14, 1986.

Amendment of Order, counterclaim.

Decision by Donald A. Campbell, Judicial Officer.

AMENDMENT TO DECISION AND ORDER

On May 1, 1986, a Decision and Order was issued in this proceeding. Through inadvertence the "Order" portion of the Decision and Order did not set forth the statutory time periods within which the reparation award and attorney's fees must be paid. The Decision is not being changed. The Order is amended to provide the dates by which payment must be made, which is within 30 days of the issuance of this Amendment.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant as reparation $84,825.83, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

Within 30 days from the date of this order respondent shall pay to complainant for attorney's fees and other expenses $8,473.39, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

HARDEN FARMS, INC., d/b/a HARDEN FARMS OF CALIFORNIA, *v.* C. H. ROBINSON COMPANY, PACA Docket No. 2-7035. Decided May 15, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Owen Gleason, Esquire, Eden Prairie, MN, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,871.80 in connection with a

transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 25, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 25, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GLOBAL BERRY SALES, INC., *v.* TOM LANGE COMPANY, INC., PACA Docket No. 2-7047. Decided May 15, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,717.55 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 27, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 27, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC., *v.* H. SCHNELL & COMPANY, INC., and/or LLOYD MYERS CO., INC., PACA Docket No. 2-6414. Decided May 27, 1986.

Reconsideration—Stay.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), an Order Upon Rehearing was issued on April 9, 1986, awarding reparation to the complainant and against respondent Lloyd Myers Co., Inc., in the amount of $7,522.00 plus interest at the rate of 13 percent per annum from December 1, 1982, until paid. By petition received May 8, 1986, respondent Lloyd Myers Co., Inc., has moved that this matter be reconsidered.

Accordingly, the order of April 9, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant and respondent H. Schnell & Company, Inc.

SEALD SWEET GROWERS, INC., *v.* CREST FRUIT CO., a/t/a FRANK LEWIS FRUIT CO., PACA Docket No. 2-6949. Decided May 27, 1986.

Settlement—Dismissal.

George S. Whitten, Presiding Officer.
Charles M. Sanders, Jr., Tampa, FL, for complainant.
Scott Toothaker, McAllen, TX, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $143,367.00 in connection with transactions involving the shipment of grapefruit in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 29, 1986, complainant notified the Department

that the parties had come to a voluntary settlement of their dispute. Complainant, in its letter of April 29, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CHIQUITA BRANDS, INC., *v.* AL NAGELBERG & CO., INC., PACA Docket No. 2-7094. Decided May 28, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Louis Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $41,921.53 in connection with a transaction involving the shipment of mixed perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. On or about April 1, 1986, complainant notified the Department by telephone that respondent tendered to complainant a check in full settlement of complainant's claim. A letter was sent to complainant on April 3, 1986, giving complainant 10 days in which to show cause why its complaint should not be dismissed. Complainant filed no response to this letter. Complainant, by its failure to respond to such letter, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HENRY T. JACOBS, *v.* KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC., PACA Docket No. 2-6531. Decided June 5, 1986.

Reparation proceeding—stayed by bankruptcy—reopened.

Andrew Stanton, Presiding Officer.
Complainant, *pro se.*
Jay L. Michaelson, Esquire, Santa Barbara, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER VACATING STAY ORDER, REOPENING PROCEEDING

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent and California Marketing of Bakersfield, Inc., in the alternative, in the amount of $705.00 in connection with a transaction involving the shipment of carrots in interstate commerce.

A copy of the formal complaint was served on respondents, but respondent Koster Enterprises failed to file an answer thereto. However, the Department was notified that respondent Koster Enterprises had filed a petition in bankruptcy. Accordingly, on May 9, 1984, this matter was stayed pending completion of respondent Koster Enterprises' bankruptcy.

On January 22, 1985, a Decision and Order was issued dismissing the complaint against California Marketing. The Decision and Order stated that the complaint against Koster Enterprises was unaffected by this ruling. In March 1986, the Department received copies of orders of discharge supposedly affecting respondent Koster Enterprises. However, those orders were found to be applicable only to certain individuals, not the respondent corporation. In a letter dated March 19, 1986, the Department gave respondent Koster Enterprises 20 days from its receipt of such letter to show cause why the May 9, 1984, Stay Order should not be vacated and the reparation proceeding reopened. Koster Enterprises did not respond to this letter.

Accordingly, the May 9, 1984, Stay Order is hereby vacated and the reparation proceeding is reopened against respondent Koster Enterprises. Respondent shall have 20 days from its receipt of this Order to file in triplicate an answer to the complaint, a copy of which is attached to this Order.

Copies of this order shall be served upon the parties.

SIGMA PRODUCE CORP. INC., *v.* HARVEY C. HANSEN, d/b/a HARVEY'S, PACA Docket No. 2-6685. Decided June 5, 1986.

Reconsideration—reparations reconsidered.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER GRANTING PETITION FOR RECONSIDERATION AND AMENDING PRIOR ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on August 22, 1985, awarding reparation to complainant against respondent. On September 3, 1985, respondent filed a petition for reconsideration, and on October 1, 1985, the order of October 22, 1985, was stayed and complainant was served with a copy of respondent's petition and given 15 days from date of receipt thereof in which to file an answer to the petition. Complainant did not file an answer.

In its petition respondent contends that our order of August 22, 1985, was in error in the factual determination that the tomatoes were originally shipped to respondent in Visalia, California and then diverted by respondent following shipment, to respondent's customer in Norfolk, Virginia. Respondent contends that the shipping documents indicating that the original destination was Visalia, California, were in error, did not reflect the agreement between the parties, and were not in accord with what actually happened. In support of this contention respondent quotes from paragraph 6 of the complaint which refers to "arrival of said truck at destination", as proof that complainant knew of the Virginia destination prior to shipment. Of course, this statement by complainant, while it may be taken as indicative of the inference which respondent urges, does not have to be so understood. Complainant could be referring to the ultimate Virginia destination without any necessary inference that complainant knew of that destination prior to shipment. Indeed this is the way we interpreted the statement at the time our original order was written. However, we have carefully reviewed the record in this matter, and two considerations lead us to the conviction that respondent is correct, and that our order of August 22, 1985, is in error. First, in a letter to this Department dated April 12, 1984, complainant's Dan Delgado stated that he had a discussion with respondent's Jim Stewart prior to the truck being loaded, in which complainant was informed that respondent's "cus-

tomer was being quoted" a lower price by competitors. While the customer is not named, the statement does lend credence to respondent's position. Second, complainant has nowhere in this proceeding advanced the position that the tomatoes were originally destined for Visalia, California, and then diverted by respondent to the Virginia customer. We conclude that we were unduly swayed by the destination stated on the shipping documents, and that complainant did in fact know prior to shipment that the tomatoes were destined for Norfolk, Virginia.

Of course this determination necessitates additional and substantial alteration in the conclusions relative to this case. First, we must now conclude that the suitable shipping condition warranty was applicable to the shipment of the subject tomatoes. Under that warranty (see 7 CFR § 46.43(j)) complainant was required to ship tomatoes which would arrive at the contract destination without abnormal deterioration provided transportation services and conditions were normal. The pulp temperatures of 50 to 51 degrees shown by the federal inspection following arrival are not much higher than the 46 degree ambient air temperature specified by complainant for the truck, and are not excessive for tomatoes. The inspection was made on the fourth day following shipment. This is not indicative of an excessive period of time in transit. We conclude, therefore, that transportation services and conditions were normal. The inspection showed the condition of the tomatoes as "average approximately 80% light red and red. 8 to 52% in most cartons, none in some, average 19% soft. Average 2% decay." Tomatoes, to make good delivery at destination, should not contain more than approximately 8% soft and/or decayed tomatoes. See 7 CFR § 51.1861(a)(2)(i); (b)(2)(i); (c)(2)(i); and (d)(2)(i); see also *Denice & Filice Packing Co.* v. *Super Food Services,* 38 Agric. Dec. 744 at 746–747 (1979). The high percentage of soft tomatoes present in this load clearly shows that complainant breached the warranty of suitable shipping condition.

The measure of damages for breach of warranty in regard to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. See UCC § 2–714. In this case respondent's customer rejected following unloading of the tomatoes. This was an act of acceptance. See *Crown Orchards Co.* v. *Mid-Valley Prod. Corp.,* 34 Agric. Dec. 381 (1975). Complainant took back 660 cartons of the tomatoes which respondent's customer made available, and resold them in New York, but failed to submit any data in regard to the proceeds of the resale. This of course makes it impossible for us to compute damages in the normal

manner. The primary burden of proof in regard to damages woul in this situation, normally fall upon respondent, and responde could, in theory have subpoenaed complainant's records in a effort to meet this burden. However, we feel that his would in fa be an extraordinary burden to place upon respondent in the co text of a shortened procedure case, especially where, as here, re spondent was not represented by counsel. On the other hand, com plainant also was not represented by counsel, and much the sam objection applies to penalizing complainant for failing to submi the necessary data for computation of damages. All in all, the most equitable solution to this problem, in our opinion, is to require that the cost of freight from Nogales, Arizona to Norfolk, Virginia be borne by complainant for those tomatoes which complainant repossessed and resold. Respondent paid this freight, but received no economic benefit from the tomatoes. Complainant did presumably receive economic benefit from the resale of the tomatoes, and it is therefore fitting, especially in view of complainant's breach, that complainant be made responsible for the freight. That freight amounted to $1.75 per flat, or $1,155.00 for the 660 flats which complainant took back. The reparation in the amount of $2,514.60 which we previously awarded should be reduced by this amount.

The order of August 22, 1985, insofar as it is in conflict with this order, is superseded. The stay order of October 1, 1985, is hereby vacated.

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, $1,359.60, with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Copies of this order shall be served upon the parties.

MISSION FRUIT & VEGETABLES DISTRIBUTORS, INC., *v.* CAL-MEX DISTRIBUTORS, INC., PACA Docket No. 2-6772. Decided June 5, 1986.

Reconsideration—denied.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (U.S.C. 499a *et seq.*), an order was issued on January 16, 1986, awarding reparation to complainant against respondent. On February 3, 1986, and within the time allowed by the Rules of Practice, respondent filed a petition for re-

consideration. The order of January 16, 1986, was automatically stayed pending issuance of a further order in this proceeding. See 7 CFR 47.24(a).

In its petition respondent contends that the order of January 16, 1986, is in error in several respects. We have reconsidered the order and find that respondent's contentions are without merit, and that the order is supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition should be and hereby is dismissed without prior service upon complainant. The order of January 16, 1986, is hereby reinstated, and the reparation awarded to complainant in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

MIC BRUCE, INC., a/t/a SINGERS, *v.* CHIQUITA BRANDS, INC., PACA Docket No. 2-6608. Decided June 10, 1986.

May 1, 1986 Order stayed—Reconsideration.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on May 1, 1986, awarding reparation to the complainant in the amount of $17,134.63. By petition received May 13, 1986, complainant has moved that this matter be reconsidered.

Accordingly, the order of May 1, 1986, is hereby stayed. Respondent shall have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of complainant's petition shall be served upon the respondent.

CLARK & MCCORD SALES, INC., *v.* JOSEPH MERCURIO PRODUCE CORP., PACA Docket No. 2-6842. Decided June 10, 1986.

Dismissal.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $13,652.62 in connection with a transaction involving the shipment of cherry tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PANADOL BROS., INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7147. Decided June 10, 1986.

Dismissal.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $27,674.50 in connection with transactions involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 12, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 12, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

JAMES C. ORR, Trustee in Bankruptcy for BRUCE C. LOFCHIE and ANITA J. LOFCHIE d/b/a BRUCE COMPANY, *v.* ANTHONY GAGLIANO & Co., INC., PACA Docket No. 2-6985. Decided June 11, 1986.

Complaint withdrawn.

John J. Casey, Presiding Officer.
Christine A. Goodrich, Fresno, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation case under the Perishable Agricultural Commodities Act, complainant's counsel of record informed the presiding officer on April 18, 1986 that the complainant had decided to withdraw the complaint. Accordingly the complaint is hereby dismissed.

Copies hereof shall be served on the parties.

WHIZPAC, INC., *v.* THOMAS COLACE COMPANY, PACA Docket No. 2-7030. Decided June 11, 1986.

Dismissal—full settlement.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
William J. Fair, Springfield, PA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $17,280.00 in connection with transactions involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 25, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement

of complainant's claim. Complainant, in its letter of April 25, 198 authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ALTON H. ALLEN and JOHN M. COELHO d/b/a SUNSET STRAWBERR GROWERS, *v.* V. F. LANASA, INC., PACA Docket No. 2-6686. Dc cided June 20, 1986.

Reconsideration—complainant's claim without merit—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on April 17, 1986, dismissing the complaint. On May 8, 1986, complainant petitioned for reconsideration of the April 17, 1986, order. In its petition, complainant asks us to rule that a buyer who receives produce in poor condition is required to have the temperature recording instrument, the tape of which shows acceptable in transit temperatures, recalibrated for accuracy. This burden has never been placed on a receiver, and should not be done so now. Had complainant wanted the instrument recalibrated, it should have taken the steps necessary to do so.

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of April 17, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition for reconsideration is dismissed without prior service upon respondent.

The order of April 17, 1986, is reinstated.

Copies of this order shall be served upon the parties.

G.A.C. PRODUCE CO., INC. *v.* OTAY PACKING CO., PACA Docket No. 2-6872. Decided June 20, 1986.

Reconsideration—Petition without merit—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on May 5, 1986, dismissing the complaint. The dismissal had been preceeded, on August 26, 1985, by an order requiring respondent to pay complainant $50,574.00 plus interest which it had admitted it owed complainant. Dismissal of the complaint regarding the $2,592.00 remaining in dispute was ordered because complainant had failed to respond to respondent's sworn answer in which it alleged that complainant had granted it a $2,592.00 allowance. Thus, we concluded that respondent's assertion was a true statement of fact.

In its petition for reconsideration, complainant submits that it had not agreed to give respondent the $2,592.00 allowance. Complainant had sufficient opportunity to respond to this allegation before the record was closed and the May 5, 1986, decision was issued. Accordingly, its unsworn denial of the respondent's allegation at this time has no merit and, in any event, is untimely filed. 7 CFR § 47.24(b).

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of May 5, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition for recommendation is dismissed without prior service upon respondent.

The order of May 5, 1986, is reinstated.

Copies of this order shall be served upon the parties.

PURE GOLD, INC., *v.* VICTOR'S PRODUCE, INC., PACA Docket No. 2-6944. Decided June 26, 1986.

Reopening.

Decision by Donald A

ORDE

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Deci-

sion and Order was issued on April 24, 1986, requiring respondent to pay complainant $1,861.00, plus interest, as reparation. The order became final on May 24, 1986. *See* 7 U.S.C. § 499g. From that date forward, since respondent did not file a timely appeal of the order, neither the Secretary nor a court has jurisdiction to hear such an appeal. *American Fruit Growers* v. *Lewis D. Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948).

On May 28, 1986, by a May 15, 1986, letter, respondent has requested reconsideration of the Decision and Order. In view of the above, we have no jurisdiction to consider the matter. Moreover, it should be noted that the filing of this untimely petition does not in any way stay the effective date of the April 24, 1986, Decision and Order, nor does it stay any sanction which may accrue to respondent for failing to satisfy the April 24, 1986, Decision and Order.

Respondent's petition is dismissed.

Copies of this order shall be served on the parties.

FRANK DONIO, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC., PACA Docket No. 2-7148. Decided June 26, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $27,528.95 in connection with a transaction involving shipments of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISION ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

TEXAS DISTRIBUTING CO. INC. *v.* BEST PRODUCE CO. INC. a/t/a NEW AIRLINE PRODUCE CO. PACA Docket No. RD-86-247. Decided May 1, 1986.

Respondent was ordered to pay complainant, as reparation, $48,558.25 plus 13 percent interest per annum from July 1, 1984, until paid.

BUSHMAN'S INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-239. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $25,615.50 plus 13 percent interest per annum from November 1, 1985, until paid.

INN FOODS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-240. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $16,614.21 plus 13 percent interest per annum from October 1, 1985, until paid.

SUN WORLD INTERNATIONAL INC. *v.* SUN FRESH PRODUCE CO. INC. PACA Docket No. RD-86-241. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $3,105.55 plus 13 percent interest per annum from April 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* MIKE D. PERKINS d/b/a TRIANGLE PRODUCE. PACA Docket No. RD-86-242. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $2,950.60 plus 13 percent interest per annum from May 1, 1985, until paid.

WILLIAM Y. MURPHEY d/b/a NATIVE AMERICAN FARMS *v.* JOE PINTO & SON. PACA Docket No. RD-86-244. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $2,639.00 plus 13 percent interest per annum from August 1, 1985, until paid.

J-B DISTRIBUTING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-245. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $5,584.40 plus 13 percent interest per annum from October 1, 1985, until paid.

PAYETTE VALLEY FRUIT INC. *v.* GILO'S PRODUCE CO. PACA Docket No. RD-86-246. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $2,388.00 plus 13 percent interest per annum from February 1, 1985, until paid.

LINDEMANN FARMS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-248. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $19,725.44 plus 13 percent interest per annum from November 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, $256.50 plus 13 percent interest per annum from October 1, 1985, until paid.

SUN VALLEY FOODS INC. *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-251. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $2,742.95 plus 13 percent interest per annum from April 1, 1985, until paid.

AMCLO INTERNATIONAL MARKETING 82 INC. *v.* THE JIM FAULKNER CO. INC. PACA Docket No. RD-86-252. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $3,405.40 plus 13 percent interest per annum from November 1, 1984, until paid.

C. RAKER & SONS *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-253. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $18,456.50 plus 13 percent interest per annum from October 1, 1985, until paid.

LOS MACHOS FARMS d/b/a BIG RIVER DEVELOPMENT CO. *v.* JOHN E. REYNA d/b/a REYNA BROTHERS. PACA Docket No. RD-86-254. Decided May 21, 1986.

Respondent was ordered to pay complainant $6,642.15 plus 13 percent interest per annum until paid.

SUN WORLD INTERNATIONAL INC. *v.* KEVIN LYNN LUTHER d/b/a LUTHER PRODUCE. PACA Docket No. RD-86-255. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $18,068.45 plus 13 percent interest per annum from June 1, 1985, until paid.

TEIXEIRA FARMS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-257. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $3,489.50 plus 13 percent interest per annum from October 1, 1985, until paid.

DANNA & DANNA INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-258. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $510.00 plus 13 percent interest per annum from September 1, 1985, until paid.

OREGON ONIONS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-259. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $6,269.25 plus 13 percent interest per annum from October 1, 1985, until paid.

LINDEMANN FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-260. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $4,535.28 plus 13 percent interest per annum from September 1, 1985, until paid.

VENIDA PACKING INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-261. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $2,419.50 plus 13 percent interest per annum from August 1, 1985, until paid.

REYNOLDS PACKING COMPANY a/t/a M & R COMPANY *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-262. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $8,022.65 plus 13 percent interest per annum from September 1, 1985, until paid.

J. L. BRANCH PACKING CO. *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-264. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $42,303.78 plus 13 percent interest per annum from December 1, 1984, until paid.

SUNKIST GROWERS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-265. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $2,790.00 plus 13 percent interest per annum from November 1, 1985, until paid.

SAHARA PACKING COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-266. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $1,772.00 plus 13 percent interest per annum from October 1, 1985, until paid.

ACTION PRODUCE *v.* V & A PRODUCE. PACA Docket No. RD-86-267. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $1,327.50 plus 13 percent interest per annum from September 1, 1985, until paid.

M. L. GALLOWAY INTERNATIONAL INC. a/t/a GALLOWAY FARMS INTERNATIONAL *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-268. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $11,532.25 plus 13 percent interest per annum from May 1, 1985, until paid.

BAKER BROKERAGE INC. a/t/a RUDY BROKERAGE CO. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-276. Decided May 30, 1986.

Respondent was ordered to pay complainant, as reparation, $4,608.85 plus 13 percent interest per annum from April 1, 1985, until paid.

GROWERS MARKETING SERVICE INC. *v.* BUONPASTORE & CO. INC. PACA Docket No. RD-86-277. Decided May 30, 1986.

Respondent was ordered to pay complainant, as reparation, $57,715.26 plus 13 percent interest per annum from August 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, $8,362.50 plus 13 percent interest per annum from April 1, 1985, until paid.

PAPPAS & CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-274. Decided June 3, 1986.

Respondent was ordered to pay complainant, as reparation, $18,045.78 plus 13 percent interest per annum from September 1, 1985, until paid.

RIO VISTA LIMITED a/t/a GIUMARRA OF ESCONDIDO *v.* LA HACIENDA BRANDS INC. PACA Docket No. RD-86-279. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $27,298.50 plus 13 percent interest per annum from August 1, 1985, until paid.

VEG-A-MIX *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-280. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,221.25 plus 13 percent interest per annum from October 1, 1985, until paid.

TEIXEIRA FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-281. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,608.85 plus 13 percent interest per annum from September 1, 1985, until paid.

V. H. AZHDERIAN & CO. INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-282. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,785.96 plus 13 percent interest per annum from September 1, 1985, until paid.

BONITA PACKING CO. a/t/a BETTERAVIA FARMS *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-283. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $1,129.95 plus 13 percent interest per annum from September 1, 1985, until paid.

THE GARIN COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-284. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,770.10 plus 13 percent interest per annum from November 1, 1985, until paid.

GARNAND MARKETING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-285. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $10,112.25 plus 13 percent interest per annum from January 1, 1986, until paid.

LOUIS J. CARIC and STEVEN L. CARIC d/b/a LOUIS CARIC & SONS *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-286. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,736.00 plus 13 percent interest per annum from September 1, 1985, until paid.

CHIQUITA BRANDS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-287. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $10,621.28 plus 13 percent interest per annum from December 1, 1985, until paid.

STEVCO INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-288. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $1,026.00 plus 13 percent interest per annum from October 1, 1985, until paid.

PHELAN & TAYLOR PRODUCE COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-289. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,514.50 plus 13 percent interest per annum from October 1, 1985, until paid.

GOLD DIGGER APPLES INC. *v.* JORGE L. RIVAS d/b/a PANCHO'S PRODUCE CO. PACA Docket No. RD-86-290. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $1,176.00 plus 13 percent interest per annum from August 1, 1985, until paid.

BEEF STAKE TOMATO GROWERS INC. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-291. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $9,120.00 plus 13 percent interest per annum from November 1, 1985, until paid.

S. STAMOULES INC. a/t/a STAMOULES PRODUCE CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-292. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $21,916.44 plus 13 percent interest per annum from September 1, 1985, until paid.

NATURIPE BERRY GROWERS *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-293. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $37,155.00 plus 13 percent interest per annum from September 1, 1985, until paid.

NIKADEMOS DISTRIBUTING COMPANY INC. *v.* BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $2,327.75 plus 13 percent interest per annum from April 1, 1985, until paid.

A.T.B. DISTRIBUTING CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-296. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $5,460.90 plus 13 percent interest per annum from October 1, 1985, until paid.

JACKIE M. JORDAN *v.* STEVEN K. CHUNG d/b/a LEE'S MARKET PRODUCE. PACA Docket No. RD-86-297. Decided June 19, 1986.

Respondent was ordered to pay complainant, as reparation, $21,103.00 plus 13 percent interest per annum from July 1, 1985, until paid.

SUNKIST GROWERS *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-298. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $2,282.00 plus 13 percent interest per annum from June 1, 1985, until paid.

SCOTT FINKS CO. INC. *v.* OLYMPIC WHOLESALE PRODUCE & FOODS INC. PACA Docket No. RD-86-299. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $830.00 plus 13 percent interest per annum from July 1, 1985, until paid.

ROYAL FRUIT COMPANY *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-300. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $1,894.25 plus 13 percent interest per annum from November 1, 1985, until paid.

DOLE FRESH FRUIT COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-301. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $14,544.50 plus 13 percent interest per annum from January 1, 1986, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

SUNRISE PRODUCE, INC., *v.* RUSS ELLIS, d/b/a EVERYBODY'S PRODUCE, PACA Docket No. RD-86-201. Decided May 2, 1986.

Bankruptcy—Automatic Stay—Continuance.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $10,618.75 against respondent in connection with transactions in

interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Sunrise Produce, Inc., is a corporation whose address is P. O. Box 306, Quincy, Washington 98848. Respondent, Russ Ellis, doing business as Everybody's Produce, is an individual whose address is P. O. Box 1170, Clearlake Park, California. Respondent was licensed or was subject to license under the Act at the time of the transactions involved herein.

Prior to the default in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Northern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

KERMIT CHAPMAN & SONS, INC., *v.* AL NAGELBERG & CO., INC., PACA Docket No. RD-86-219. Decided May 2, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 28, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

VALERIO'S PRODUCE, *v.* F. BOGON COMPANY, PACA Docket No. RD-86-222. Decided May 15, 1986.

Full settlement—dismissed.

Dennis Becker, Presiding Officer.
William J. Fair, Springfield, PA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *eq seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,664.60 in connection with transactions involving the shipment of perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 11, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of April 11, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FOUR STAR TOMATO, INC., *v.* REM BROKERAGE CO., INC., PACA Docket No. RD-86-129. Decided May 27, 1986.

Complaint improperly served—Complaint reopened.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance

of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Respondent's claim that the complaint was signed for by someone from L. R. Clark Company, which has an office in respondent's building, and not respondent, is borne out by the signature on the return receipt card. Therefore, the complaint was not properly served. Accordingly, respondent's default in the filing of an answer is set aside. Respondent will have 10 days from receipt of this order to file an answer.

Copies of this order shall be served upon the parties.

SARGENT PRODUCE COMPANY *v.* BOLER FARMS, PACA Docket No. RD-86-275. Decided May 27, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,565.25 in connection with a transaction involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 7, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 7, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FLANAGAN & JONES, INC., *v.* RUSS ELLIS, d/b/a EVERYBODY'S PRODUCE, PACA Docket No. RD-86-243. Decided June 10, 1986.

Bankruptcy discharged—Continuance.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $4,937.50 against respondent in connection with transactions in interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Flanagan & Jones, Inc., is a corporation whose address is P. O. Box 487, Quincy, Washington 98848. Respondent, Russ Ellis, doing business as Everybody's Produce, is an individual whose address is P. O. Box 1170, Clearlake Park, California. Respondent was licensed or was subject to license under the Act at the time of the transactions involved herein.

Prior to the default in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Northern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC., *v.* J. V. CAMPISI, INC., PACA Docket No. RD-86-185. Decided June 11, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall be given 10 days from its receipt of this order in which to file its answer.

Copies of this order shall be served upon the parties.

C. H. ROBINSON COMPANY, *v.* ED SCHWARTZ, d/b/a ED'S FARMERS MARKET, PACA Docket No. RD-86-192. Decided June 11, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall have 10 days from its date of this order in which to file its answer.

Copies of this order shall be served upon the parties.

THE PRODUCE PLACE, *v.* THE GUY C. PANNO COMPANY, INC. a/t/a PRODUCE PLUS, PACA Docket No. RD-86-191. Decided June 20, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent will have 10 days from its receipt of this order to file an answer. If a timely answer is not filed, in triplicate, the Default Order will be reinstated.

Copies of this order shall be served upon the parties.

JOS. CIMINO FOODS, INC., *v.* CONTINENTAL PRODUCE, INC., PACA Docket No. RD-86-227. Decided June 20, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded tha the motion to reopen was filed within a reasonable time, and tha good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall be given twenty days from its receipt of this order in which to file an answer to the complaint.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC., *v.* DIXIELAND PRODUCE INC., PACA Docket No. RD-86-256. Decided June 25, 1986.

Petition to reopen—claim untimely filing due to paperwork—denied—Reparation awarded.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON PETITION TO REOPEN, AND DEFAULT ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in connection with a transaction involving vegetables, all being perishable agricultural commodities, in interstate commerce. A copy of the formal complaint was served upon respondent and respondent has not filed an answer thereto. By letter dated April 23, 1986, received by the Department on April 29, 1986, respondent petitioned for reopening of its default. In support of its petition, respondent claimed that, although it had received the complaint, due to a "paper-work [back] up" the complaint was not located until after it received the Department's April 15, 1986, notice that it was in default. The record reflects that respondent was served with a copy of the complaint on February 26, 1986, by certified mail. We cannot accept its claim that a "paper-work [back] up" caused it to misplace official correspondence received by certified mail until it received the April 15, 1986, letter. While these matters are handled in a somewhat less formal manner than court proceedings, nevertheless the members of the produce industry cannot choose to ignore them. Some modicum of formality must be followed. It appears that respondent elected to deal with this matter in a cavalier fashion. Somewhat more is required of persons who get served with copies of formal reparation complaints by certified mail which are accompanied by a Departmental letter calling

for a response thereto within 20 day of receipt. In view of this, respondent's petition to reopen is denied. Accordingly, the issuance of an order without further procedure is appropriate pursuant to Section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complaint, Tom Lange Company, Inc., is a corporation whose mailing address is P.O. Box 4701, Springfield, Illinois 62708. Respondent, Dixieland Produce Inc., is a corporation whose mailing address is Box 5474, Birmingham, Alabama 35207.

Respondent was licensed under the Act at the time of the transaction involved herein. The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order and constitute a violation or violations by respondent of Section 2 of the Act (& U.S.C. 499b). Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, the amount stated below, which we find to be the amount of damages to which complainant is entitled as a result of the violation found herein, with interest thereon at the rate of 13 percent per annum from the following date, until paid.

REPARATION AWARD: $4,402.60, with interest thereon from June 1, 1985, until paid.

Copies hereof shall be served upon the parties.

H. SCHNELL & COMPANY, INC., *v.* MEDINA FRUITS & VEGETABLES, INC., PACA Docket No. RD-86-169. Decided June 26, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer and a Default Order was issued on March 3, 1986. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Pursuant to 7 CFR 47.25(e), no

spondent will have 10 days from receipt of this order to file an answer, in triplicate. If respondent fails to do so, the Default Order will be reinstated.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC., *v.* P. J. PRODUCE CO., PACA Docket No. RD-86-229. Decided June 26, 1986.

Denied—untimely.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR REOPENING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a default order was issued on April 29, 1986, requiring respondent to pay complainant $726.00, plus interest, as reparation. The order became final on May 29, 1986. *See* 7 U.S.C. § 499g. From that date forward, since respondent did not file a timely appeal of the order, neither the Secretary nor a court has jurisdiction to hear such an appeal. *American Fruit Growers* v. *Lewis D. Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948).

On June 2, 1986, by a May 30, 1986, telegram, respondent has requested reopening of its default. In view of the above, we have no jurisdiction to consider the matter. Moreover, it should be noted that the filing of this untimely petition does not in any way stay the effective date of the April 29, 1986, Default Order, nor does it stay any sanction which may accrue to respondent for failing to satisfy the April 29, 1986, Default Order.

Respondent's petition is dismissed.

Copies of this order shall be served on the parties.

failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: SUPER BROTHERS EXOTIC NURSERY, INC., PQ Docket No. 203. Decided May 2, 1986.

Shipment of nursery stock—not inspected—Civil Penalty—Consent.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

On March 4, 1986, this proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151 - 164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Acts and regulations promulgated thereunder (7 CFR §§ 301.75-301.75-8). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Super Brothers Exotic Nursery, Inc., respondent, is a corporation whose address is 17190 S.W. 216th Street, Goulds, Florida 33170.

2. On or about April 9, 1985, at Miami, Florida, the respondent offered to Eastern Airlines, for shipment to Puerto Rico, two cartons of Florida citrus nursery stock on airbill number 49-46-9792.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of this proceeding. Therefore, such order and decision will be issued.

ORDER

The respondent Super Brothers Exotic Nursery, Inc. is assessed a civil penalty of three hundred seventy-five dollars ($375). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day of this order is served upon the respondent.

In re: WESTERN AIRLINES, PQ Docket No. 96. Decided May 12, 1986.

Released infected flowers without inspection—Civil Penalty—Consent.

Clement McGovern, for complainant.
Robert Crane, Corporate Attorney, Los Angeles, CA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.74 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Western Airlines, respondent, is a corporation doing business at Los Angeles International Airport, 10053 International Road, Los Angeles, California 90045.

2. On or about September 6, 1985, the respondent was in possession of cut flowers from the Netherlands which were infested with lepidopterous larvae, an actionable pest.

3. On or about January 19, 1985, the respondent released cut flowers from the Netherlands without proper inspection.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: PEGGY SAY, PQ Docket No. 178. Decided May 12, 1986.

Uninspected luggage—Civil Penalty—Consent.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek the judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Peggy Say, respondent, is an individual whose address is 18542 Pueblo Circle, Huntington, California 92646.

2. On or about February 14, 1985, respondent was in possession of several pieces of luggage at Honolulu International Airport.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and Decision will be issued.

ORDER

The respondents is assessed a civil penalty of one hundred and twenty five dollars ($125.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: AERO MAYFLOWER TRANSIT COMPANY, INC., PQ Docket No. 211. Decided May 14, 1986.

Moved outdoor household articles interstate—no inspection—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. The respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Aero Mayflower Transit Company, Inc., respondent, is a corporation whose mailing address is Box 107B, Indianapolis, Indiana 46206–0107.

2. On or about October 10, 1985, the respondent moved interstate outdoor household articles from Ledyard, Connecticut, to Duluth, Minnesota.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred twenty-five dollars ($525.00). The respondent shall make payment by sending a certified check or money order, payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: THADDEA NAVIGATION CO., LTD., PQ Docket No. 204. Decided May 20, 1986.

Foreign-origin garbage not in proper containers—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act (7 U.S.C. § 150aa *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*) and the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111 and 120) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Thaddea Navigation Co., Ltd, violated the Acts and regulations promulgated thereunder (7 CFR Part 330 and 9 CFR Part 94). Respondent Thaddea Navigation Co., Ltd., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Thaddea Navigation Co., Ltd., admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure:

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Thaddea Navigation Co., Ltd., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACTS

1. Thaddea Navigation Co., Ltd., respondent herein, is a company whose agent for purposes of service of process is, Eller and Co., Inc., Box 4304, Jacksonville, Florida 32001.

2. On or about May 1, 1985, the respondent's ship, the "Eftychis M", was within the territorial waters of the United States at Jacksonville, Florida, and the ship's foreign-origin garbage was not contained in tight, leak-proof covered receptacles.

CONCLUSION

Respondent, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order, in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Thaddea Navigation Co., Ltd, is assessed a civil penalty of two hundred fifty dollars ($250.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before May 15, 1986.

This Order shall become effective upon service of the respondent.

In re: SOUTHERN STAR, PQ Docket No. 214. Decided May 20, 1986.

Stored regulated garbage aboard ship—Civil Penalty—Consent.

Clement McGovern, for complainant.
Daniel L. Smith, Jr., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Southern Star, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 93.1 and 7 CFR § 380.1 and 7 CFR § 1.130 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining

allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Southern Star, respondent, is a corporation whose principle place of business is 245 Park Avenue, New York, New York 10167.

2. On or about November 29, 1985, the respondent stored regulated garbage aboard the vessel M/V EUGENIE-C, at Wilmington Maine Terminal, Wilmington, Delaware.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

In re: HERBERT HAYNES and H. C. HAYNES, INC. PQ Docket No. 172. Decided May 23, 1986.

Moved logs from moth high risk area through unregulated areas—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Kevin Cuddy, Bangor, ME, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151 *et seq.* and 150aa *et seq.*), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Herbert Haynes and H. C. Haynes, Inc., respondents, violated the Act and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. The respondent, Herbert Haynes, is dismissed from this proceeding.

2. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, H. C. Haynes, Inc., specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits for the purpose of compromise only to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

3. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. H. C. Haynes, Inc., respondent, is a corporation doing business at Route 2, Box 96, Winn, Maine 04495.

2. On or about September 24, 1985, the respondent caused to move interstate regulated articles, specifically 3,000 board feet of

pine logs with bark, from Brimfield, Massachusetts, a gypsy moth high risk area, through a nonregulated area in Maine, to Armstrong, Quebec, Canada.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order ahd decision will be issued.

ORDER

The respondent, Herbert Haynes, is dismissed from this proceeding. The respondent, H. C. Haynes, Inc., is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall make payment by sending a certified check or money order, payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: EASTERN AIR LINES, INC., EGBERT HERNANDEZ, JOSE PADIN, and TONY RIVERA, PQ Docket No. 216. Decided May 29, 1986.

Uninspected luggage—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Francisco Ponsa-Flores, San Juan, PR, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Eastern Air Lines, Inc., Egbert Hernández, José Padín and Tony Rivera, violated the PQA and regulations promulgated thereunder (7 CFR Subpart 318.58). Respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, Tony Rivera and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, and Tony Rivera, admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision, and;

2. Respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, and Tony Rivera, also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by them in connection with this proceeding.

FINDINGS OF FACTS

1. Eastern Air Lines, Inc., respondent, herein, is a company, whose address for purposes of service of process is, Eastern Air Lines, Inc., Legal Affairs Department, Miami International Airport, Miami, Florida 33148.

2. Egbert Hernández, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Airlines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

3. José Padín, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Air Lines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

4. Tony Rivera, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Air Lines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

5. On or about September 22, 1985, respondent Eastern Air Lines, Inc., and respondent Egbert Hernández possessed three pieces of baggage at Luis Muñoz Marín International Airport, San Juan, Puerto Rico destined for Hartsfield International Airport, Atlanta, Georgia.

6. On or about October 6, 1985, respondent Eastern Air Lines, Inc., and respondent José Padín possessed two pieces of baggage at

Luis Muñoz Marín International Airport, San Juan, Puerto Rico, destined for John F. Kennedy International Airport, Jamaica, New York.

7. On or about October 19, 1985, respondent Eastern Air Lines, Inc., and respondent Tony Rivera possessed one piece of baggage at Luis Muñoz Marín International Airport, San Juan, Puerto Rico, destined for John F. Kennedy International Airport, Jamaica, New York.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Eastern Air Lines, Inc., is assessed a civil penalty of two thousand three hundred and fifty dollars ($2,350); and

Respondent Egbert Hernández is assessed a civil penalty of one hundred twenty five dollars ($125); and

Respondent José Padín is assessed a civil penalty of one hundred twenty five dollars ($125); and

Respondent Tony Rivera is assessed a civil penalty of one hundred twenty five dollars ($125), said civil penalties shall be paid by certified checks or money orders, payable to, "The Treasurer of the United States" and they shall be sent to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Bldg., U. S. Department of Agriculture, Washington, D. C. 20250-1400, on or before May 30, 1986.

This Order shall become effective upon filing with the Hearing Clerk by the Administrative Law Judge.

In re: REBECCA MIRANDA, PQ Docket No. 208. Decided May 30, 1986.

Complainant filed to dismiss—Dismissed.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant filed a motion to dismiss the complaint without prejudice on the ground of newly discovered evidence.

IT SHOULD BE AND HERE BY IS ORDERED that the complaint is dismissed without prejudice.

In re: JOSETTE RATON, PQ Docket No. 245. Decided May 30, 1986.

Complainant's motion to dismiss—Dismissal.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant filed a motion to dismiss the complaint on the grounds that prosecution is no longer warranted to effect the purposes of the program.

IT SHOULD BE AND HERE BY IS ORDERED that the complaint is dismissed without prejudice.

In re: BAO CHAN d/b/a HAWAII TROPICAL PRODUCTS, PQ Docket No. 20. Decided June 2, 1986.

Offered uninspected plants for shipment—Civil Penalty—Consent.

Terry Medley, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7

U.S.C. §§ 151–164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Bao Chan d/b/a Hawaii Tropical Products, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bao Chan d/b/a Hawaii Tropical Products, respondent, is a company whose address is P. O. Box 618, Kurtistown, Hawaii 96760.

2. On or about February 14, 1984, the respondent offered for shipped to a common carrier from Hilo, Hawaii, to San Francisco, California 240 pounds of breadfruit and 140 pounds of green jackfruit.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred and fifty dollars ($250.00) which shall be payable to the "Treasurer of

the United States" by certified check or money order, and which shall be forwarded to Terry L. Medley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S.W., Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: IBERIA AIRLINES, PQ Docket No. 236. Decided June 2, 1986.

Uninspected meat products brought to Puerto Rico—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Iberia Airlines, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 94.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Iberia Airlines, respondent, is a business having its principal place of business at Luis Munoz Marin International Airport, Isle Verde, Puerto Rico 00913.

2. On or about May 23, 1985, the respondent brought a shipment of meat products within the territorial limits of the United States at San Juan, Puerto Rico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00). The respondent shall send a certified check or money order for $500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MALONE & HYDE, INC., PQ Docket No. 235. Decided June 4, 1986.

Movement of uninspected fruit—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 161 and 162), and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Malone & Hyde, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR §§ 301.75 *et seq.*). The parties have agreed

that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Malone & Hyde, Inc., respondent, is a corporation whose mailing address is P. O. Box 520427, Miami, Florida 33152.

2. On or about May 1, 1985, the respondent moved a quantity of oranges from Florida, to Puerto Rico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall send a certified check or money order for $750.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: WONG'S PRODUCE, PQ Docket No. 205. Decided June 6, 1986.

Offered uninspected produce for shipment—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Wong's Produce violated the PQA and regulations promulgated thereunder (7 CFR subpart 318). Respondent Wong's Produce and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Wong's Produce admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

United States, approximately 110 pounds of litchi and 40 pounds of soursops.

CONCLUSIONS

Respondent Wong's Produce, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Wong's Produce, is assessed a civil penalty of six hundred dollars ($600.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This Order shall become effective on the day of service upon the respondent.

In re: RENE VALLALTA. PQ Docket No. 138. Decided June 17, 1986.

Importation of prohibited seed pod—Prohibition unknown—Civil penalty.

The Judicial Officer affirmed Judge Weber's decision and order assessing a civil penalty of $250 against respondent for importing one cacao pod from El Salvador into the United States in violation of the Plant Quarantine Act and regulations. Respondent's request for a hearing to show that a relative had placed the article in his bags without his knowledge was properly denied since a $250 civil penalty would still be appropriate.

Kris Ikejiri, for complainant.
Robert Bernstein, Fairfield, California, for respondent.
William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), in which Administrative Law Judge William J. Weber (ALJ) filed an initial Decision and Order on April 15, 1986, assessing a civil penalty of $250 against respondent for importing one cacao pod from El Salvador into the United States in violation of the Act and regulations.

On May 2, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR

§ 2.35).[1] The case was referred to the Judicial Officer for decision on June 9, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged, *inter alia,* that Rene Vallalta, respondent, violated the Plant Quarantine Act, as amended (PQA) (7 U.S.C. § 151 *et seq.*), and regulations promulgated thereunder (7 CFR Part 319). Paragraph II of the complaint alleged that the respondent imported from El Salvador into New Orleans, Louisiana, approximately one (1) cacao seed pod in violation of section 319.56 of the regulations (7 CFR § 319.56), because the importation of cacao seeds is prohibited.

In his answer, the respondent admitted all of the material facts in the complaint. However, the respondent claimed that he did not know that he had the prohibited article. Respondent stated that a relative had placed the article in his bags without his knowledge. Respondent requested a hearing.

Complainant objected to respondent's request for a hearing because, by respondent's admission, there were no material issues of fact. Complainant further requested that the civil penalty of $250, as requested in the complaint, be imposed. In light of the Judicial Officer's decision in, *In re Richard Duran Lopez,* P. Q. Docket No. 59, I certified the following questions to the judicial officer:

1. Should respondent's motion for hearing be denied?

2. If no hearing is appropriate and if complainant files a motion for a decision on the pleadings, should that decision be entered finding a violation and assessing a $250.00 civil penalty against respondent Rene Vallalta?

[1] The certification was necessary to determine if "unintentional" in the *Lopez* decision is to be construed to include "un-

knowing". The Judicial Officer answered that respondent's motion for hearing should be denied and that the $250.00 civil penalty should be imposed.

WHEREFORE, in light of the Judicial Officer's answer and the complainant's motion for a decision on the pleadings, the following Findings of Fact, Conclusions, and Order shall be issued.

FINDINGS OF FACT

1. Rene Vallalta, respondent herein, is an individual whose mailing address is 2214 Burgundy Way, Fairfield, California 94533.

2. On or about August 26, 1985, the respondent imported from El Salvador into New Orleans, Louisiana, approximately one (1) cacao seed pod, in violation of section 319.56 of the regulations (7 CFR § 319.56) because the importation of cacao seed pods is prohibited.

CONCLUSIONS

By reasons of the facts alleged herein, respondent violated the PQA and regulations promulgated thereunder. Therefore, the following order shall be issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is governed by the principles set forth in *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), a copy of which is attached as an appendix.

Respondent contends that this case is distinguishable from *Lopez* because in *Lopez*, the respondent knew that he had one piece of sugarcane in his possession, but did not know that it was unlawful to bring it into the United States, whereas here, respondent's relative placed the prohibited cacao pod in his luggage, without his knowledge. However, that distinction is not material. As explained in *Lopez*, in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws. If that policy were not followed where forbidden items were placed in luggage by relatives or friends of the violator, a loophole would be created that could prove disastrous to American agriculture. Accordingly, the *Lopez* doctrine will be followed here.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Rene Vallalto is assessed a civil penalty of $250, which shall be payable to the "Treasurer of the United States," by certified check or money order, and it shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400, within 30 days from the service of this order.

APPENDIX

In re Lopez, 44 Agric. Dec. ___ (Oct. 7, 1985).
[This decision is referenced only. Not printed.—Ed.]

In re: PAULINE ANGELA HUDSON, PQ Docket No. 141. Decided March 19, 1986.

Imported fruit without permit—Civil Penalty—Default.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

vided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Pauline Angela Hudson, respondent, is an individual whose address is 112-39 203rd Street, St. Albans, New York 11412.

2. On or about April 26, 1985, at John F. Kennedy International Airport, respondent imported ten mangoes from Jamaica into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By her silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Pauline Angela Hudson is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded toFronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal* to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 23, 1986.—Ed.]

In re: GLOBAL VAN LINES, PQ Docket No. 241. Decided June 25, 1986.

Movement of household articles interstate—Civil Penalty—Consent.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912 as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Global Van Lines, respondent, is a corporation incorporated under the laws of the State of California and having its principle place of business at #1 Global Way, Anaheim, California 92803.

2. On or about September 4, 1985, respondent moved outdoor household articles from Stoney Brook, Suffolk County, New York to San Diego, California.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred and seventy-five dollars ($375.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: MANUEL NORIEGA, PQ Docket No. 143. Decided May 1, 1986.

Fruit imported without permit—Civil Penalty.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)). The Office of the Hearing Clerk mailed to respondent, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. The Postal Service returned the documents unclaimed. The Hearing Clerk then remailed the documents by regular mail. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding. (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of

the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Manuel Noriega, respondent, is an individual whose address is 1840 Rockwood, Apt. 67, Calexico, California 92331.

2. On or about October 23, 1984, at Calexico, California, respondent imported 26 limes and two plums from Mexico into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Manuel Noriega is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after

service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 26, 1986.—Ed.]

AGRICULTURAL MARKETING AGREEMENT ACT, 1937 PAGE

AUDIT BY MARKET ADMINISTRATOR

Authority to examine books and records 928

Confidentiality of books and records 928

COURT DECISION

U.S. District Court, Northern District of Illinois, Eastern Division, Judicial Officer's Decision and Order affirmed 923

HANDLER

Partially regulated, Secretary's jurisdiction over 928

ANIMAL QUARANTINE AND RELATED LAWS

CIVIL PENALTY

Of $100.00 944

Of $150.00 939, 940, 948

Of $500.00 950, 962

Of $700.00 954

Of $750.00 953

Of $1,000.00 952

Of $1,000.00 ($500.00 per violation) 963

Of $1,500.00 942

Of $2,000.00, abeyance as long as compliance with order 967

Of $2,500.00 ($500.00 per violation) 956

Of $3,500.00, total for 2 respondents 942

Of $6,000.00 947

CEASE AND DESIST

Operation of facility for garbage treatment and feeding garbage to swine 967

DISMISSAL

For good cause 969

ANIMAL QUARANTINE AND RELATED LAWS—Cont.

VETERINARY ACCREDITATION PAGE

Suspended for 3 months..... 965

ANIMAL WELFARE ACT

ANNUAL REPORT

Failure to file..... 978

CIVIL PENALTY

Of $100.00..... 978

Of $250.00..... 979

Of $600.00..... 970

Of $1,000.00..... 981, 982, 984

Of $1,500.00..... 976

Of $5,000.00..... 984

DISEASE CONTROL

Failure to maintain program for..... 970

DISMISSAL

For good cause shown..... 987

FACILITIES

Food and bedding, storage of..... 976

Improper contruction material..... 982

Improper marine housing..... 982

Improper sanitation..... 979

Improper storage of food..... 979

Interior surfaces, construction and maintenance of..... 976

Overcrowding..... 979

LICENSE

Cease and desist from engaging in business for which license is required..... 981

Engaged in business without securing..... 979, 981

ANIMAL WELFARE ACT—Cont.

SUSPENSION PAGE

Suspended for:

14 days and thereafter until in compliance....984

30 days and thereafter until in compliance....985

FEDERAL MEAT INSPECTION ACT

DISMISSAL

For good cause shown....988

PACKERS AND STOCKYARDS ACT, 1921

ACCOUNTS AND RECORDS

Failure to maintain accurately....1128

Keep accurate records pertaining to all bills, invoices, and other transactions....1106

AMENDMENT OF ORDER

Amended to provide date for full restoration....1133

APPEAL

Not timely filed, dismissed....1131

BONDING REQUIREMENT

Failure to comply with....991, 1065, 1068, 1070, 1079, 1117

CHECKS OR DRAFTS

Issuing insufficient funds checks....1062, 1079, 1083

CIVIL PENALTY

PACKERS AND STOCKYARDS ACT, 1921—Cont.

CIVIL PENALTY—Cont. PAGE

Of $17,000.00 ... 1120

Of $20,000.00 ... 1053, 1055, 1106

Of $25,000.00 ... 1071, 1073

Of $50,000.00 ... 995, 1034

COMMERCIAL BRIBERY

Giving gifts related to purchase ... 1053

Making payments to buyers ... 1034

Preferential payments ... 1077

Violation of P&S Act ... 995

CUSTODIAL ACCOUNT

Failure to deposit sale proceeds into ... 993, 1122

Mismanagement of ... 1062, 1071

DEALER

Issuing insufficient funds checks ... 1090

Must maintain adequate bond ... 1088, 1108, 1116

Prohibited from engaging in business subject to Act ... 1128

Suspension, bonding required ... 1116

Suspension, inadequate bond ... 1087

Suspended as registrant ... 1114, 1128

DEALER AND MARKET AGENCY

Suspended as registrant ... 1085, 1120, 1122, 1128

DISMISSAL

Of complaint, payment in full ... 1135

Of portion of complaint by complainant ... 1135

INSOLVENCY

Engaging in business while current liabilities exceed current assets ... 993, 1132

PACKERS AND STOCKYARDS ACT, 1921—Cont.

MISREPRESENTATION PAGE

Of livestock weights 989, 1055

Through false documentation 989

PACKER

Issuing insufficient funds checks 1073

PAYMENT

Failure to pay full purchase price 1051, 1114, 1128

Failure to pay when due 1073, 1090, 1128

PROHIBITED FROM ENGAGING IN BUSINESS

60 days, respondent Joe P. Riley 989

90 days, respondent Jeffrey M. Riley 989

PURCHASE PRICE

Failure to pay and/or failure to pay when due 1116

Failure to pay full purchase price 991, 1077, 1083, 1122

REPARATIONS AWARD

Complainant due balance for agency purchases 1135

SCALES AND WEIGHING

Cease and desist from weighing livestock at other than true and correct weights 989

SHIPPERS' PROCEEDS ACCOUNT

Failure to maintain properly 1120

PACKERS AND STOCKYARDS ACT, 1921—Cont.

SUSPENSION OF REGISTRATION PAGE

Suspended for:

7 days and thereafter until no longer insolvent and shortage in Custodial Account for Shippers' Proceeds has been eliminated....1120

21 days and thereafter until liabilities do not exceed assets....993

2 years and thereafter if insolvent....1090

5 years and thereafter until in compliance with bonding requirements....1065

5 years or less if payment is made in full....1116

Until in compliance with bonding requirements....1066, 1085

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

ACCEPTANCE OF COMMODITY

Admission of....1268

ACCOUNTINGS

Failure to keep accurate records....1280, 1333, 1358

ADMISSION

Of debt for produce....1292

Of indebtedness...1279, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303

Of liability....1323, 1324, 1325, 1350, 1352, 1353

BANKRUPTCY

Continues reparation action after discharge....1395

Reparation action continued....1392

BROKER

Memorandum determined terms in absence of agreement....1276

CONTRACT

Fails to specify quality....1320

Granting of protection and handling proven....1303

New price agreement....1361

CONTRACT—Cont.

Oral modification binding.....

Period of protection disputed.....

Respondent proved allowance given.....

CONTRACT PRICE

Disputed price adjustment.....

CONTRACT TERM

Broker statement assumed to be without basis.....

"Next week's market" price resolved as average for week.....

Price dispute.....

COUNTERCLAIM

Dismissal of.....

Dismissed, untimely filing.....

COURT DECISIONS

U.S. Court of Appeals, District of Columbia Circuit, Petition for review, denied.....

DAMAGES

Speculative profits cannot be basis of award.....

DEFAULT

Complaint improperly served.....

Not reopened, untimely filing.....

Order reopening after..... 1396

DELIVERED SALE

When standards absent, related standards and decisions can serve as criteria.....

DISMISSAL

After accepting full payment, cannot claim more.....

Complainant authorized dismissal of complaint.....

Denied, petition without merit.....

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

DISMISSAL—Cont.

PAGE

No additional payments due complainant 1345

Of complaint 1272

Respondent tendered payment in full 1370, 1376, 1377, 1380, 1394, 1364, 1365, 1367, 1368

Settlement reached 1369, 1393

FAILURE TO PAY PROMPTLY

License application denied 1203

License revoked 1199

License suspended 1152

Publication of the facts 1201

F.O.B. SALE

Purchaser responsible for freight expense 1276

Suitable shipping conditions warranty, breach of 1264

INDUSTRY TRADE CUSTOM

Guide to decisions under PACA 1215

LICENSE

Appeal of application denied 1153

Granted, suspended 90 days for violations 1211

RECONSIDERATION/REOPEN

Denied, appeal untimely 1379

Denied, paperwork backup not defense 1398

Dismissed, complainant's claims without merit 1378, 1379

Motion to reopen, granted 1394, 1396, 1397, 1398 1400, 1401

Petition for reconsideration, denied 1363

Petition for reopen, dismissed 1378

Respondent's petition without merit 1374

REJECTION

Wrongful, F.O.B. sale 1354

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

PAGE

REPARATION AWARDED

Balance due and owing 1268, 1274, 1276, 1279, 1283, 1286

Balance due and owing after damages 1279

Balance due and owing less damages 1264

Balance due and owing on contracts and legal expenses 1245

Denied, receiver not burdened with temperature recorder calibration 1378

Reimbursement and expenses due 1215

Respondent now current with suppliers 1151

STAY ORDER

Pending filing of an answer to the petition for reconsideration 1369, 1375

Vacated 1371

Vacated, reparations recalculated 1372

WARRANTY

Breach of, failure to prove 1313

Breach proven by respondent 1326

PLANT QUARANTINE ACT

CIVIL PENALTY

Of $125.00 1405

Of $250.00 1408, 1415, 1421, 1424, 1427

Of $375.00 1402, 1426

Of $450.00 1409

Of $500.00 1417

Of $525.00 1406

Of $600.00 1420

Of $750.00 1411, 1418

Of $1,000.00 1403

Of $2,350.00 for airline, $125.00 each individual 1412

DISMISSAL PAGE

Motion by complainant....1415

GARBAGE

Foreign-origin garbage not in proper containers....1408

Stored regulated garbage aboard ship....1409

PROHIBITED/RESTRICTED ARTICLE

Fruit imported without merit....1424, 1427

Moved logs from moth high risk area through unregulated areas....1411

Movement of uninspected fruit....1418

Offered uninspected plants for shipment....1402

Released infected flowers without inspection....1403

Seed pod imported....1421

Uninspected meat products brought to Puerto Rico....1417

*U. S. GOVERNMENT PRINTING OFFICE:1987-516-293:62686

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

VOL. 45 NO. 3

PAGES 913-1439

MAY-JUNE 1986

Compiled And Published By:

Editor, Agriculture Decisions

Hearing Clerk Unit

Office Of Administrative Law Judges

U.S. Department Of Agriculture

Room 1079 South Building

Washington, D.C. 20250

Direct all inquiries regarding this publication
to the address indicated above.

PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

TABLE OF CONTENTS

MAY-JUNE 1986

PAGE

LIST OF DECISIONS REPORTED, MAY-JUNE 1986 913

AGRICULTURE MARKETING AGREEMENT ACT, 1937

COURT DECISION 923

PROCEEDINGS ON PETITIONS 928

ANIMAL QUARANTINE AND RELATED LAWS 939

ANIMAL WELFARE ACT 970

FEDERAL MEAT INSPECTION ACT 988

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS 989

REPARATION DECISIONS 1135

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS 1150

DISCIPLINARY DECISIONS 1152

REPARATION DECISIONS 1215

REPARATION DEFAULT DECISIONS 1381

PLANT QUARANTINE ACT 1402

SUBJECT INDEX, MAY-JUNE 1986 1430

NOTE

A list of decisions reported and a subject index are published in each issue of Agriculture Decisions. A list of decisions reported and a subject index for the entire volume (or calendar year) are published in the November-December issue.

MAY-JUNE 1986

AGRICULTURAL MARKETING ACT OF 1937 PAGE

PROCEEDINGS ON PETITIONS

VALLEY FARMS, INC. AMA Docket No. M 4-22. Decision and Order 928

COURT DECISION:

COUNTY LINE CHEESE COMPANY and MEADOW GOLD DAIRY *v.* JOHN R. BLOCK, SECRETARY, DEPARTMENT OF AGRICULTURE and ASSOCIATED MILK PRODUCERS, INC. Civil Action No. 85 C 1811. Memorandum Opinion and Order 923

ANIMAL QUARANTINE AND RELATED LAWS

BUFORD, CLARK. A.Q. Docket No. 244. Consent Decision and Order 951
CANNON, MARGY. A.Q. Docket No. 242. Consent Decision 940
CODY, ROBERT "BOB". A.Q. Docket No. 252. Consent Decision 953
CONRAD, DONALD. A.Q. Docket No. 235. Consent Decision and Order 954
COX, HORACE R. A.Q. Docket No. 160. Dismissal of Complaint 969
DOBSON, JOHNNY. A.Q. Docket No. 251. Consent Decision and Order 948
DOSS, JIM, RONALD O. EHRLIGH and DR. PHILLIP SMITH, D.V.M. A.Q. Docket No. 136. Consent Decision for Ronald O. Ehrlich 944
GIBSON, GORDON. A.Q. Docket No. 250. Consent Decision and Order 962
GUTMAN BROTHERS, LTD. A.Q. Docket No. 225. Decision and Order 956
HALLEY, SR., LONGINO. A.Q. Docket No. 258. Consent Decision and Order 967
HUGHES, JIMMY. A.Q. Docket No. 253. Consent Decision and Order 950
FILSINGER, DVM, WILLIAM C. VA Docket No. 37. Default Decision and Order 965
LAMBETH, BONNIE. A.Q. Docket No. 231. Consent Decision 945
OUTLAW, MORGAN. A.Q. Docket No. 241. Consent Decision 939
ROWAN, BILLY E. A.Q. Docket No. 187. Default Decision and Order 963
SASSEEN, DOUG, and RANDALL HOOVER d/b/a OZARKS REGIONAL STOCKYARD A.Q. Docket No. 229. Order Dismissing Complaint 969
TARVER, LANCE, and TOMMY COLEMAN. A.Q. Docket No. 221. Default Decision and Order 942
TEXAS LIVESTOCK MARKETING ASSOCIATION, INC., DUDE HARRISON and A. J. LINDSEY. A.Q. Docket No. 141. Consent Decision and Order 947
BOOTH, JONI. AWA Docket No. 289. Order to Dismiss 987

ANIMAL WELFARE ACT

CITY OF NEW BEDFORD, MASSACHUSETTS. AWA Docket No. 386. Consent Decision and Order 98
FOSTER, DONALD D., d/b/a WHITE GATE KENNELS. AWA Docket No. 375. Consent Decision 98
FOSTER, JIM and MARY, d/b/a OAK LEAF KENNELS. AWA Docket No. 371. Consent Decision 97
HAMPTON, HENRY d/b/a HAMPTON ENTERPRISE. AWA Docket No. 372. Consent Decision 98

ANIMAL WELFARE ACT—Cont. PAGE

LOGAN COLLEGE OF CHIROPRACTIC. AWA Docket No. 345. Consent Decision 978
QUAS, GARY, d/b/a BAMBI PARK. AWA Docket No. 379. Order to Dismiss 987
STATE UNIVERSITY OF NEW YORK. AWA Docket No. 346. Consent Decision 976
STEPHENS, RICK. AWA Docket No. 382. Consent Decision 981
ZARTMAN, MARLIN U., d/b/a GILBERTSVILLE SALES STABLES. AWA Docket No. 292. Decision and Order 970

FEDERAL MEAT INSPECTION ACT

GREEN LAKE MEATS, INC. FMIA Docket No. 89. Dismissal of Complaint 988

PACKERS AND STOCKYARDS ACT, 1921

DISCIPLINARY DECISIONS:

BOARDMAN, OWEN A. P&S Docket No. 6694. Consent Decision 1087
BRODY & SONS, INC., HARRY, and HERBERT S. SMALL. P&S Docket No. 6575. Consent Decision 1053
BUSHELLE CATTLE COMPANY, INC. P&S Docket No. 6639. Order Denying Late Appeal 1131
CARTER-KIRCHOFF FEED YARD, INC. and BOB CARTER. P&S Docket No. 6611. Amendment of Order 1133
CIRCLE B. MEAT CO., INC. d/b/a FLORIDA BONELESS BEEF, and CIRCLE B. PORTION MEAT CO., GEORGE E. MUELLER, SR., and JAY A. MUELLER. P&S Docket No. 6614. Decision and Order with Respect to Circle B. Meat Co., Inc., and George A. Mueller, Sr., Upon Admission of Facts by Reason of Default 1073
COCHRAN, FRED, and DALE COCHRAN. P&S Docket No. 6693. Consent Decision 1116
CORN STATE MEAT COMPANY, INC., TERRANCE P. (TERRY) PRINCE, JR., and JAMES L. WIGGS, P&S Docket No. 6427. Decision and Order 995
COUNTRY CUTS OF IOWA, INC., DAVID F. OLSON, LUTHER GESME, JACK L. WARD, and RICHARD HOBSON. P&S Docket No. 6515. Consent Decision 1077
FARINELLI, JR., CELIVO NICK. P&S Docket No. 6642. Decision and Order Upon Admission of Facts by Reason of Default 1083
FARMERS LIVESTOCK AUCTION, INC. P&S Docket No. 6266. Supplemental Order 1130
GARVER, RICHARD N. P&S Docket No. 6449. Decision and Order 1090
GILES AND STRATTON AUCTION, INC., d/b/a LIVESTOCK PRODUCERS, FLOYD GILES, and RONNIE STRATTON, P&S Docket No. 6660. Consent Decision 1120
GLOVER, STANLEY V., v. LIMON LIVESTOCK EXCHANGE, and MIKE JORGENSEN. P&S Docket No. 6562. Order of Dismissal 1135
GRANT, DOUGLAS B., an individual, and GRANT LIVESTOCK, INC., a corporation. P&S Docket No. 6570. Decision and Order Upon Admission of Facts by Reason of Default 1079

PACKERS AND STOCKYARDS ACT, 1921—Cont.

DISCIPLINARY DECISIONS—Cont. PAGE

HENSLEY, RAYMOND. P&S Docket No. 6534. Consent Decision 1117
HOLIDAY FOOD SERVICES, INC., and NAT ROCKER, P&S Docket No. 6488. Decision and Order 1034
KLEMME CATTLE CO., INC. P&S Docket No. 6455. Decision and Order 1108
KOEBKE, LAWRENCE. P&S Docket No. 6603. Decision and Order Upon Admission of Facts by Reason of Default 991
KREWSON, TERRY, BOBBIE KREWSON, D. E. KREWSON, and LICKING LIVESTOCK AUCTION COMPANY, INC., P&S Docket No. 6702. Consent Decision 1122
LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH. P&S Docket No. 6174. Consent Decision with Respect to Chaim Treibatch 1106
LINDEN PACKING CO., INC. P&S Docket No. 6536. Decision and Order 1055
NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK, and GEORGE BITZ. P&S Docket No. 6678. Consent Decision with Respect to Donald A. Hauck 1126
NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK, and GEORGE BITZ. P&S Docket No. 6678. Consent Decision with Respect to Respondents Napoleon Livestock Auction, Inc., and George Bitz 1128
OLE SALEM PACKING CO., INC., and GREGORY H. MITCHELL. P&S Docket No. 6668. Consent Decision 1051
RANCHERS AND FARMERS LIVESTOCK AUCTION, INC. and L. KIRBY POWELL. P&S Docket No. 6692. Consent Decision. 993
SUPPLEMENTAL ORDER 1132
REDMAN, HARRY P. P&S Docket No. 6613. Consent Decision 1065
RIFFEE, ALLEN H. P&S Docket No. 6477. Supplemental Order 1133
RILEY, JEFFREY M., and JOE P. RILEY. P&S Docket No. 6553. Consent Decision 989
RIPPY, INC., JAY, d/b/a CATTLEMAN'S LIVESTOCK COMMISSION CO. P&S Docket No. 6568. Consent Decision 1088
ROYAL CREST MEATS, INC. P&S Docket No. 6643. Decision and Order Upon Admission of Facts by Reason of Default 1068
SCHOLL, JOHN A. P&S Docket No. 6684. Consent Decision 1085
SELECTED MEATS, INC., JOSEPH A. MEINDL, and ROBERT D. HINDSLEY. P&S Docket No. 6430. Consent Decision 1062
STAFFORD, CHARLES RAY, and ROBERT E. STAFFORD. P&S Docket No. 6445. Consent Decision 1070
TODD, RICHARD. P&S Docket No. 6664. Consent Decision 1066
UMBERGER, B. C. P&S Docket No. 6691. Consent Decision 1114
WESSELS, GARY. P&S Docket No. 6423. Supplemental Order 1132
WESTERN STOCKYARDS CORPORATION. P&S Docket No. 6680. Consent Decision 1071

REPARATION DECISIONS:

ZEMLISKA, LEO, d/b/a PROFESSIONAL FEEDER CONSULTANTS v. GLASGOW LIVESTOCK SALES CO., and ROBERT D. FJELDHEIM. P&S Docket No. 6064. Decision and Order 113

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 PAGE

COURT DECISIONS:

REEVES PRODUCE, INC. v. UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, Civil Actions 85-1602. Petition for Review of an Order of the United States Department of Agriculture 1151

REEVES, ROBERT L., v. UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, Civil Actions 85-1517, 85-1518, 85-1519. Petitions for Review of Orders of the United States Department of Agriculture 1150

DISCIPLINARY DECISIONS:

BATTAGLIA DISTRIBUTING COMPANY, INC. PACA Docket No. 2-7167. Consent Decision and Order 1211

ELLIOTT PRODUCE, EMERSON. PACA Docket No. 2-6970. Decision and Order 1199

GREEN VILLAGE FRUIT AND VEGETABLE, INC. PACA Docket No. 2-6845. Decision and Order 1202

GULFPORT TOMATOES, INC. PACA Docket No. 2-7085. Decision and Order 1201

H & J BROKERAGE, INC. PACA Docket No. 2-6437. Decision and Order . 1154

SOBIECH, TED. PACA Docket No. 2-6902. Consent Decision and Order ... 1152

Correction to Consent Decision 1153

REPARATION DECISIONS:

A.T.B. DISTRIBUTING CO. v. FRESHVILLE PRODUCE DISTRIBUTING INC. PACA Docket No. 2-7149. Reparation Order 1350

ALLEN, ALTON H., and JOHN M. COELHO d/b/a SUNSET STRAWBERRY GROWERS v. V. F. LANASA, INC. PACA Docket No. 2-6686. Order on Reconsideration 1378

ACTION PRODUCE v. INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7126. Reparation Order 1299

AGRI-PAK FRUIT CO. v. NICHO PRODUCE CO., INC. and/or SO. CENTRAL BROKERAGE, INC. PACA Docket No. 2-6723. Decision and Order 1354

BALL, RONALD J., and RUEY BALL d/b/a BALL BROS. PRODUCE v. BEACON PRODUCE CO. PACA Docket No. 2-7115. Reparation Order 1301

BARRETT PRODUCE, INC, DICK, d/b/a BARRETT-FISHER CO., INC. v. BEACON PRODUCE CO. PACA Docket No. 2-7109. Reparation Order 1296

BELRIDGE PACKING CO. v. BEACON PRODUCE CO. PACA Docket No. 2-7111. Reparation Order 1279

BLUE ANCHOR, INC. v. BEACON PRODUCE CO. PACA Docket No. 2-7106. Reparation Order 1294

BODEGAS RANCHO SAN VALENTINE S. DE R.L. v. OTAY PACKING CO. PACA Docket No. 2-6809. Decision and Order 1358

BRUCE, INC., MIC, a/t/a SINGER'S v. CHIQUITA BRANDS, INC. PACA Docket No. 2-6608. Decision and Order 1215

Stay Order 1375

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont. PAGE

CHECCHI, ALFONSO, *v.* L&J PACKING, INC. PACA Docket No. 2-6813. Order of Dismissal 1364
CHIQUITA BRANDS, INC. *v.* AL NAGELBERG & Co., INC. PACA Docket No. 2-7094. Order of Dismissal 137(
CLARK & MCCORD SALES, INC. *v.* JOSEPH MERCURIO PRODUCE CORP. PACA Docket No. 2-6842. Order of Dismissal 137(
CRISP COUNTY VEGETABLE PACKERS, INC. *v.* DIAMOND-T PRODUCE CORP. PACA Docket No. 2-6631. Decision and Order 1345
D'ARRIGO BROS. CO. OF CALIFORNIA *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7142. Reparation Order 1324
DELAWARE PRODUCE GROWERS, INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7113. Reparation Order 1293
DELIS COMPANY, INC., NICK, *v.* EARLES J. SCHMUCKER and WAYNE A. SCHMUCKER d/b/a SCHMUCKER'S POTATO STORAGE. PACA Docket No. 2-6907. Decision and Order 1307
DELIS COMPANY, INC., NICK, *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7124. Reparation Order 1303
DELIS COMPANY, INC., NICK, *v.* METRO PRODUCE INC. PACA Docket No. 2-6883. Decision and Order 1276
DEW-GRO, INC. a/t/a CENTRAL WEST PRODUCE *v.* SEE SUN HO KEE, INC. PACA Docket No. 2-7114. Order of Dismissal 1366
DEW-GRO, INC. a/t/a WEST PRODUCE *v.* BEACON PRODUCE CO. PACA Docket No. 2-7108. Reparation Order 1292
DONIO, INC., FRANK, *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7148. Order of Dismissal 1380
DYNASTY FARMS, INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7110. Reparation Order 1297
F & J PRODUCE SALES *v.* HRDLICKA DAIRY CATTLE INC. a/t/a HRDLICKA BROS. PRODUCE CO. PACA Docket No. 2-6900. Decision and Order 1342
FINUCANE GILSON & FOSTER, INC. *v.* DEARDORFF-JACKSON COMPANY. PACA Docket No. 2-6831. Decision and Order 1361
FOUR STAR TOMATO, INC. *v.* TOMATOES, INC. PACA Docket No. 2-6834. Decision and Order 128(
FRESH WESTERN MARKETING, INC. *v.* CORGAN & SON, INC. PACA Docket No. 2-6885. Decision and Order 131(
FRUIT MARKETING, INC. *v.* LOFCHIE INC. a/t/a BRUCE CO. PACA Docket No. 2-6857. Decision and Order 126(
G.A.C. PRODUCE CO., INC. *v.* THE OTAY PACKING CO. PACA Docket No. 2-6872, Decision and Order 127
Order on Reconsideration 137
GOLD COAST PACKING, INC. *v.* H. SCHNELL & COMPANY, INC. and/or LLOYD MYERS CO., INC. PACA Docket No. 2-6414. Stay Order 136
GLOBAL BERRY SALES, INC. *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-7047. Order of Dismissal 136
HARDEN FARMS, INC. d/b/a HARDEN FARMS OF CALIFORNIA *v.* C. H. ROBINSON COMPANY. PACA Docket No. 2-7035. Order of Dismissal ... 136

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont.

PAGE

HARLOFF PACKING, INC., ROGER, *v.* JOHN LIVACICH PRODUCE, INC. a/t/a VISTA SALES. PACA Docket No. 2-6829. Decision and Order 1280

JACOBS, HENRY T., *v.* KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC. PACA Docket No. 2-6531. Order Vacating Stay Order, Reopening Proceeding 1371

JEROME COMPANY, LTD., I. R., *v.* CORGAN & SON, INC. PACA Docket No. 2-6861. Decision and Order 1283

LYN-DE FARMS, INC. *v.* MIDWEST PRODUCE BROKERAGE, INC. PACA Docket No. 2-6925. Decision and Order 1289

LYN-DE FARMS, INC. *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-6986. Order of Dismissal 1365

MENDELSON-ZELLER CO., INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7112. Reparation Order 1300

MERRILL FARMS *v.* J. CARUSO PRODUCE, INC. PACA Docket No. 2-6371. Decision and Order 1326

MEYER, ROBERT L., d/b/a MEYER TOMATOES *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7125. Reparation Order 1298

MISSION FRUIT & VEGETABLES DISTRIBUTORS, INC. *v.* CAL-MEX DISTRIBUTORS, INC. PACA Docket No. 2-6772. Order on Reconsideration 1374

NAPLES TOMATO GROWERS, INC. *v.* PETER G. PAPPAS and PHILIP G. PAPPAS d/b/a PETE PAPPAS & SONS. PACA Docket No. 2-6879. Decision and Order 1274

NORTHCROSS, KENT W., d/b/a NORTHCROSS DISTRIBUTING *v.* GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL. PACA Docket No. 2-6824. Decision and Order 1320

O&E GROWERS, INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7150. Reparation Order 1352

ORR, JAMES C., TRUSTEE IN BANKRUPTCY for BRUCE C. LOFCHIE and ANITA J. LOFCHIE d/b/a BRUCE COMPANY *v.* ANTHONY GAGLIANO & CO., INC. PACA Docket No. 2-6985. Order of Dismissal 1377

PANADOL BROS, INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7147. Order of Dismissal 1376

PECOS CANTALOUPES CO., INC. *v.* BEACON PRODUCE CO. PACA Docket No. 2-7107. Reparation Order 1295

PEMBERTON PRODUCE, INC. *v.* TOM LANGE COMPANY, INC. PACA Docket No. 2-7090. Order of Dismissal 1365

PURE GOLD, INC. *v.* VICTOR'S PRODUCE, INC. PACA Docket No. 2-6944. Order Denying Petition for Reopening 1379

SEALD SWEET GROWERS, INC. *v.* CREST FRUIT CO. a/t/a FRANK LEWIS FRUIT CO. PACA Docket No. 2-6949. Order of Dismissal 1369

SIGMA PRODUCE CORP. INC. *v.* HARVEY C. HANSEN d/b/a HARVEY'S. PACA Docket No. 2-6685. Order Granting Petition for Reconsideration and Amending Prior Order 1372

SMITH, THOMAS B., d/b/a THOMAS B. SMITH FARMS *v.* I. M. C. BROKERAGE & PRODUCE CO., INC. PACA Docket No. 2-6777. Decision and Order 1268

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont. PAGE

SONORA RANCHES, INC. *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7143. Reparation Order 1325
STAMOULES, INC., S., d/b/a STAMOULES PRODUCE CO. *v.* SOL SALINS, INC. PACA Docket No. 2-6795. Ruling on Reconsideration 1363
SUNNYSIDE PACKING COMPANY *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7141. Reparation Order 1323
VALENZUELA, THOMAS G., d/b/a T. G. VALENZUELA PRODUCE *v.* TEDDY BERTUCA d/b/a TEDDY BERTUCA COMPANY. PACA Docket No. 2-6710. Decision and Order 1333
WATSONVILLE PRODUCE, INC. *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-7164. Reparation Order 1353
WILLOUGHBY, BARTON, d/b/a WILLOUGHBY FARMS *v.* FRITO-LAY INC. PACA Docket No. 2-6614. Decision and Order 1245
Amendment to Decision and Order 1367
WHIZPAC, INC. *v.* THOMAS COLACE COMPANY. PACA Docket No. 2-7030. Order of Dismissal 1377
WOOD CO.-VISTA, INC., J. A., a/t/a J. A. WOOD CO. *v.* BEACON PRODUCE. PACA Docket No. 2-6860. Decision and Order 1303
WOOD CO.-VISTA, INC., J. A., *v.* INTER-TEX ENTERPRISES, INC. PACA Docket No. 2-7123. Reparation Order 1302

REPARATION DEFAULT DECISIONS:

A.T.B. DISTRIBUTING CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-296 1390
ACTION PRODUCE *v.* V & A PRODUCE. PACA Docket No. RD-86-267 1385
AMCLO INTERNATIONAL MARKETING 82 INC. *v.* THE JIM FAULKNER CO. INC. PACA Docket No. RD-86-252 1383
AZHDERIAN & CO. INC., V. H., *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-282 1387
BAKER BROKERAGE INC. a/t/a RUDY BROKERAGE CO. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-276 1386
BEEF STAKE TOMATO GROWERS INC. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-291 1389
BONITA PACKING CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-249 1382
BONITA PACKING CO. a/t/a BETTERAVIA FARMS *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-283 1388
BRANCH PACKING CO., J. L., *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-264 1385
BRINGINO, LESLIE J., *v.* JOSE A. GOMEZ d/b/a FUERTE DISTRIBUTORS CO. PACA Docket No. RD-86-278 1386
BUSHMANS' INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-239 1381
CAL MEX DISTRIBUTORS, INC. *v.* P. J. PRODUCE CO. PACA Docket No. RD-86-229. Order Denying Petition for Reopening 1400

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.

PAGE

CARIC, LOUIS J., and STEVEN L. CARIC d/b/a LOUIS CARIC & SONS *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-286..... 1388

CHAPMAN & SONS, INC., KERMIT, *v.* AL NAGELBERG & CO., INC. PACA Docket No. RD-86-219. Order of Dismissal..... 1392

CHIQUITA BRANDS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-287..... 1388

CHIMINO FOODS, INC., JOS., *v.* CONTINENTAL PRODUCE, INC. PACA Docket No. RD-86-227. Order Reopening after Default..... 1397

DANNA & DANNA INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-258..... 1384

DOLE FRESH FRUIT COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-301..... 1391

FINKS CO. INC., SCOTT, *v.* OLYMPIC WHOLESALE PRODUCE & FOODS INC. PACA Docket No. RD-86-299..... 1391

FLANAGAN & JONES, INC. *v.* RUSS ELLIS d/b/a EVERYBODY'S PRODUCE. PACA Docket No. RD-86-243. Order..... 1395

FOUR STAR TOMATO, INC. *v.* REM BROKERAGE CO., INC. PACA Docket No. RD-86-129. Order Reopening after Default..... 1393

GALLOWAY INTERNATIONAL INC., M. L., a/t/a GALLOWAY FARMS INTERNATIONAL *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-268..... 1386

GARIN COMPANY, THE, *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-284..... 1388

GARNAND MARKETING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-285..... 1388

GOLD DIGGER APPLES INC. *v.* JORGE L. RIVAS d/b/a PANCHO'S PRODUCE CO. PACA Docket No. RD-86-290..... 1389

GROWERS MARKETING SERVICE INC. *v.* BUONPASTORE & CO. INC. PACA Docket No. RD-86-277..... 1386

HOMESTEAD TOMATO PACKING CO., INC. *v.* J. V. CAMPISI, INC. PACA Docket No. RD-86-185. Order Reopening after Default..... 1396

INN FOODS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-240..... 1381

J-B DISTRIBUTING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-245..... 1382

JORDAN, JACKIE M., *v.* STEVEN K. CHUNG d/b/a LEE'S MARKET PRODUCE. PACA Docket No. RD-86-297..... 1390

LANGE COMPANY, INC., TOM, *v.* DIXIELAND PRODUCE INC. PACA Docket No. RD-86-256. Ruling on Petition to Reopen, and Default Order..... 1398

LINDEMANN FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-260..... 1384

LINDEMANN FARMS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-248..... 1382

LOS MACHOS FARMS d/b/a BIG RIVER DEVELOPMENT CO. *v.* JOHN E. REYNA. PACA Docket No. RD-86-254..... 1383

LULU PACKING CORPORATION *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-250..... 1382

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont. PAGE

MURPHEY, WILLIAM Y., d/b/a NATIVE AMERICAN FARMS *v.* JOE PINTO & SON. PACA Docket No. RD-86-244 1382
NATURIPE BERRY GROWERS *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-293 1380
NIKADEMOS DISTRIBUTING COMPANY INC. *v.* BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295 1390
PAPPAS & CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD 86-274 1387
PAYETTE VALLEY FRUIT INC. *v.* GILO'S PRODUCE CO. PACA Docket No. RD-86-246 1383
PHELAN & TAYLOR PRODUCE COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-289 1389
PRODUCE PLACE, THE, *v.* THE GUY C. PANNO COMPANY, INC. a/t/a PRODUCE PLUS. PACA Docket No. RD-86-191. Order Reopening after Default 1397
OREGON ONIONS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-259 1384
R & W FARMS INC. *v.* EVERYBODY'S PRODUCE. PACA Docket No. RD 86-202 1386
RAKER & SONS, C., *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD 86-253 1393
REYNOLDS PACKING COMPANY a/t/a M & R COMPANY *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-262 1385
RIO VISTA LIMITED a/t/a GIUMARRA OF ESCONDIDO *v.* LA HACIENDA BRANDS INC. PACA Docket No. RD-86-279 1387
ROBINSON COMPANY, C. H., *v.* ED SCHWARTZ d/b/a ED'S FARMERS MARKET. PACA Docket No. RD-86-192 1396
ROBINSON COMPANY, C. H., *v.* MIKE D. PERKINS d/b/a TRIANGLE PRODUCE. PACA Docket No. RD-86-242 1394
ROYAL FRUIT COMPANY *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-300 1391
SAHARA PACKING COMPANY *v.* WALLA WALLA PRODUCE COMPANY PACA Docket No. RD-86-266 1395
SARGENT PRODUCE COMPANY *v.* BOLER FARMS. PACA Docket No. RD 86-275. Order of Dismissal 1394
SCHNELL & COMPANY, INC., H., *v.* MEDINA FRUITS & VEGETABLES INC PACA Docket No. RD-86-169. Order Reopening after Default 1399
SNOKIST GROWERS *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-298 1392
SPADA DISTRIBUTING CO., INC. *v.* PATELLA & CO., INC. PACA Docket No. RD-86-263. Order Reopening after Default 1400
STAMOULES INC., S., a/t/a STAMOULES PRODUCE CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-292 1388
STEVCO INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-288 1398
SUN VALLEY FOODS INC. *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-251 1401

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont. PAGE

SUN WORLD INTERNATIONAL INC. *v.* KEVIN LYNN LUTHER d/b/a LUTHER PRODUCE. PACA Docket No. RD-86-255 1383
SUN WORLD INTERNATIONAL INC. *v.* SUN FRESH PRODUCE CO. INC. PACA Docket No. RD-86-241 1381
SUNKIST GROWERS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-265 1385
SUNRISE PRODUCE, INC. *v.* RUSS ELLIS d/b/a EVERYBODY'S PRODUCE. PACA Docket No. RD-86-201. Order 1391
TEIXEIRA FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-281 1387
TEIXEIRA FARMS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-257 1384
TEXAS DISTRIBUTING CO. INC. *v.* BEST PRODUCE CO. INC. a/t/a NEW AIRLINE PRODUCE CO. PACA Docket No. RD-86-247 1381
VALERIO'S PRODUCE *v.* F. BOGON COMPANY. PACA Docket No. RD-86-222. Order of Dismissal 1393
VEG-A-MIX *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-280 1387
VENIDA PACKING INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-261 1384

PLANT QUARANTINE ACT

AERO MAYFLOWER TRANSIT COMPANY, INC. P.Q. Docket No. 211. Consent Decision 1406
CHAN, BAO. d/b/a HAWAII TROPICAL PRODUCTS. P.Q. Docket No. 20. Consent Decision 1415
EASTERN AIR LINES, INC., EGBERT HERNANDEZ, JOSE PADIN, and TONY RIVERA. P.Q. Docket No. 216. Consent Decision 1412
GLOBAL VAN LINES. P.Q. Docket No. 241. Consent Decision 1426
HAYNES, HERBERT, and H. C. HAYNES, INC. P.Q. Docket No. 172. Consent Decision 1411
HUDSON, PAULINE ANGELA. P.Q. Docket No. 141. Decision and Order 1424
IBERIA AIRLINES. P.Q. Docket No. 236. Consent Decision 1417
MALONE & HYDE, INC. P.Q. Docket No. 235. Consent Decision 1418
MIRANDA, REBECCA. P.Q. Docket No. 208. Order Dismissing the Complaint 1415
NORIEGA, MANUEL. P.Q. Docket No. 143. Decision and Order 1427
RATON, JOSETTE. P.Q. Docket No. 245. Order Dismissing the Complaint. 1415
SAY, PEGGY. P.Q. Docket No. 178. Consent Decision 1405
SOUTHERN STAR. P.Q. Docket No. 214. Consent Decision 1409
SUPER BROTHERS EXOTIC NURSERY, INC. P.Q. Docket No. 203. Consent Decision 1402
THADDEA NAVIGATION CO., LTD. P.Q. Docket No. 204. Consent Decision 1408
VALLALTA, RENE. P.Q. Docket No. 138. Decision and Order 1421
WESTERN AIRLINES. P.Q. Docket No. 96. Consent Decision 1403
WONG'S PRODUCE. P.Q. Docket No. 205. Consent Decision and Order 1420

COURT DECISION

COUNTY LINE CHEESE COMPANY and MEADOW GOLD DAIRY *v.* JOHN R. BLOCK, SECRETARY, DEPARTMENT OF AGRICULTURE and ASSOCIATED MILK PRODUCERS, INC. Civil Action No. 85 C 1811. (USDA AMA Docket No. M 49-1.) Decision entered June 11, 1986.

Garrett B. Stevens, for defendant.
Sydney Berde, St. Paul, Minnesota, for defendant intervenor.
John H. Vetne, Peterborough, New Hampshire, for plaintiffs (petitioners).
Dorothea A. Baker, Administrative Law Judge.

Donald A. Campbell, Judicial Officer.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Memorandum Opinion and Order entered by Ann Claire Williams, Judge.

MEMORANDUM OPINION AND ORDER

County Line Cheese Company and Meadow Gold Dairy, both divisions of Beatrice Foods Company, brought this action under § 8(c)(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608(c)(15)(B) (1980) (the "Act"), seeking review of a final adjudicatory decision by the Secretary of Agriculture of the United States (the "Secretary"). The Secretary, through his Judicial Officer, dismissed plaintiffs' petition for relief from an audit adjustment which costs plaintiffs $328,003.44. Associated Milk Producers, Inc. ("AMPI") has intervened in this action and asks the court to uphold the Secretary's decision. All parties have moved for summary judgment. For the reasons set forth below, the court affirms the Secretary's decision.

In order to understand the issues in this case, it is necessary to make a brief foray into the byzantine labyrinth of the Agricultural Marketing Agreement Act. As the Supreme Court pointed out in *Zuber* v. *Allen*, 396 U.S. 168 (1969), two peculiar characteristics of the milk industry account for a natural instability in the market:

> [The milk industry has a] basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.
>
> Milk has essentially two end uses: as a fluid staple of daily consumer diet, and as an ingredient in manufactured dairy products such as butter and cheese. Milk used in the consumer market has traditionally commanded a premium

> price, even though it is of no higher quality than milk used for manufacture. While cost differences account for part of the discrepancy in price, they do not explain the entire gap. At the same time the milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months.

Zuber v. *Allen*, 396 U.S. at 172–73.

The Court went on to show that this oversupply was easily exploited by milk distributors, or "handlers." Milk for fluid consumption is highly perishable; it is thus natural that nearby producers should supply the fluid needs of any given market. However, handlers can manipulate the market to their advantage by acquiring milk for fluid use from geographically distant farmers, even paying a higher price than those farmers could get from their ordinary buyers—cheese manufacturing plants. Once these handlers had saturated their local market with milk from distant producers, local farmers were forced to sell their milk for lower-priced manufacturing purposes. With this scenario combined with the seasonal glut periods natural to the industry, farmers had to increase production, and, the Court observed, "the disequilibrium snowballs." *Id.* at 173.

The chaos that resulted from these practices was greatly magnified by a further collapse in prices during the Depression. *Id.* at 174. Congress responded by enacting the Agricultural Marketing Agreement Act. One of the goals of the Act is to allocate among all milk producers the benefits of higher-priced fluid use and the burdens of oversupply. The vehicle for achieving this is the regional milk marketing order which provides for minimum prices which each handler must pay producers for their milk. Since producers receive the same price regardless of the milk's ultimate use, competition for the fluid market is eliminated and farmers can maintain their herds so as to supply the region's dairy needs as a whole. *Id.* at 177–81.

The burden of supplying the fluid market now shifts to the handlers. All handlers pay a uniform minimum price; those who primarily supply fluid needs will therefore reap a windfall; those whose milk will go to manufacturing plants will be overcharged. The Act neutralizes this inequity by authorizing a "producer settlement fund" which is maintained by a Market Administrator. Han-

> Pool plant status should not be determined solely on an occasional shipment of milk to the market. . . . Such a method for determining which plants shall be subject to regulation would not provide a workable basis for administering an order for the Indianapolis marketing area. . . .
>
> Essential to the operation of a marketable pool is the establishment of performance standards to apply uniformly to all plants. . . .
>
> Performance standards should be such that any plant which has as its major function the supplying of milk to the market would pool its sales and share in the marketwide equalization. On the other hand, plants only casually, or incidentally, associated with the market should not be subject to complete regulation. Neither should they be permitted or required to equalize their sales with all plants in the market. If a milk plant were to be permitted to share on a pro rata basis the Class I utilization of the entire market without being genuinely associated with the market, then the differentials paid by users of Class I milk could be dissipated without accomplishing their intended purpose. If a plant were to be qualified and fully regulated merely by making a token shipment of milk or cream into the market for sale as Class I milk, then any milk plant which found itself in a position where it was selling a smaller share of its milk in Class I than the average for all regulated handlers might make such shipment and receive equalization payments from the pool.

26 Fed. Reg. 67, 69–70 (1961).

This reasoning by the Secretary is clear and rationally related to the purposes of the Act. Plants do not have to associate with the regulated market. But if they do, they must really associate, which means making more than occasional shipments. The Market Administrator was fully justified in construing the Secretary's language that milk must be "shipped to" to mean what it obviously must mean: it must be pumped into the plant, not merely greeted at the door and sent somewhere else. To hold otherwise would destroy the integrity of the Indiana market; if supply plants could join the pool by having less than 50 percent of their shipments "shipped to" pool distributing plants, they could share in the benefits of the pool, withdrawing payments from the producer settlement fund, without sharing the burdens.

dlers who distribute primarily fluid (or Class I) products must pay into the fund the difference between the uniform price they paid to producers and the premium Class I price they received on the retail market. Handlers who distribute milk primarily for manufacturing purposes such as cheese (Class II or III) are entitled to draw from the fund the difference between the uniform price they paid the producers and the lower Class II or III price they received. *Id.* at 174–79. Clearly, there are benefits to participating in this pool, and just as clearly, the Secretary, and through him the Market Administrator, must be able to define and monitor the qualifications that producers and handlers must meet in order to participate.

The Indiana Milk Order at issue in this case requires that in order to qualify as a pool supply plant a supply plant must deliver at least 50 percent of its milk to a pool distributing plant. 7 CFR § 1049.7 (1968). The assessments against the plaintiffs resulted from audit adjustments by the Market Administrator who determined that County Line, a supply plant, and Meadow Gold, a distributing plant, had not met the Indiana Order's requirements for pool status. The series of transactions at issue involved shipments by County Line to Meadow Gold. The milk was not needed at Meadow Gold, so it was sent on to a non-pool manufacturing plant owned by County Line. The Market Administrator disqualified these shipments from the pool since the milk, although it entered Meadow Gold's premises, was not "shipped to" Meadow Gold as the Market Administrator construed that term. For a milk shipment to be "shipped to" a plant, said the Market Administrator, it must be pumped into that plant. By disqualifying these shipments, County Line fell below the Indiana Order's 50 percent requirement and lost its pool status. Meadow Gold was forced to re-classify its shipments from County Line as non-pool milk. Plaintiff's Complaint at 5, 6.

Plaintiffs argue that this court should reverse the Secretary's decision because the Market Administrator's construction of 7 CFR § 1049.7(b) is arbitrary and capricious, with no rational relationship to the purposes of the Act. (See, *Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308, 317 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969) for the standard of review which this court must apply). This contention has no merit. The Secretary clearly explained the policy behind the Indiana Order in 33 Fed. Reg. 18,282, 18,288–89 (1968) and 26 Fed. Reg. 67, 69–70 (1961) (both rulemaking decisions are relevant since the 1968 Indiana Order presently in force incorporates by reference the 1961 Decision):

Indiana Order. They will not be permitted to exploit a lacuna in the regulatory scheme which already works in their favor and—quite incredibly—demand that the gap be widened so that they can partake of the benefits of the market pool without associating themselves with the market.

The Decision and Order of the Secretary's Judicial Officer is therefore affirmed.

PROCEEDINGS ON PETITIONS

In re: VALLEY FARMS, INC. AMA Docket No. M 4-22. Decided April 15, 1986.

Handler—books and records, disclosure of information—confidentiality of records—pool plant—milk packaged and distributed not reported—denial of relief requested.

Sanford S. Marateck, Shamokin, PA, for petitioner.
Donald Tracy, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*, hereinafter referred to as the "Act"), instituted by petitioner, a partially regulated handler, subject to federal Milk Order No. 4, hereinafter referred to as "the Order" (7 CFR 1004). The amended petition filed herein on June 6, 1985, challenges the Market Administrator's authority to audit and examine all books and records pertaining to all sales and dispositions of milk by petitioner. The Market Administrator seeks to examine such records to verify petitioner's reports and determine petitioner's obligations under this order.

Respondent, Administrator Agricultural Marketing Service, filed an answer on July 8, 1985.

An oral hearing was held on October 30, 1985, in Philadelphia, Pennsylvania. Petitioner was represented by Sanford Marateck, Esq., Shamokin, Pennsylvania. Respondent was represented by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C. At the close of the hearing the time was fixed for the filing of briefs.

PERTINENT STATUTORY AUTHORITY

8d. Books and records; disclosure of information.

(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not

more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office. 7 USCA 608d

Pertinent Order Provisions

Order No. 4

Milk In The Middle Atlantic Marketing Area

7 CFR 1004.1 et seq. (as of Jan. 1, 1985)

§ 1004.7 Pool plant.

(a) A plant from which during the month a volume not less than 40 percent in the months of September through February, and 30 percent in the months of March through August, of its receipts is disposed of as Class I milk (except filled milk) and a volume not less than 15 percent of such receipts is disposed of as route disposition (other than as filled milk) in the marketing area. . . .

§ 1004.8 Nonpool plant.

"Nonpool plant" means a plant other than a pool plant. The following categories of nonpool plants are further defined:

(a) . . .

(b) . . .

(c) "Partially regulated distributing plant" means a plant which is not a pool plant, from which fluid milk products in consumer-type packages or dispenser units are disposed of as route disposition in the marketing area during the month. . .

§ 1004.9 Handler.

* * * * * * *

(a) Any person in his capacity as the operator of:

(1) A pool plant;

(2) A partially regulated distributing plant;

* * * * * * *

§ 1004.30 Reports of receipts and utilization.

(a) On or before the eighth day after the end of each month each handler with respect to each of his pool plants shall report for the month to the Market Administrator in the detail and on forms prescribed by the Market Administrator as follows:

(1) The quantities of skim milk and butter fat contained in:

(i) Receipts of producer milk (including such handler's own duction);

(ii) Receipts of fluid milk products from other pool plants and milk received from a cooperative association for which it is a handler pursuant to § 1004.9(c); and

(iii) Receipts of other source milk;

(2) Inventories of fluid milk products on hand at the beginning and end of the month; and

(3) The utilization of all skim milk and butterfat required to be reported pursuant to this paragraph, showing separately in-area route disposition, except filled milk, and filled milk route disposition in the area;

(b) Each handler who operates a partially regulated distributing plant shall report as required in paragraph (a) of this section, except that receipts of milk from dairy farmers shall be reported in lieu of producer milk; such report shall include a separate statement showing the quantity of reconstituted skim milk in fluid milk products disposed of on routes in the marketing area;

§ 1004.32 Other reports.

(a) Each pool handler shall report to the Market Administrator in detail and on forms prescribed by the Market Administrator as follows:

(1) On or before the 25th day after the end of the month for each pool plant, his producer payroll for such month which shall show for each producer.

(i) His name and address;

(ii) The total pounds of milk received from such producer;

(iii) The average butterfat content of such milk; and

(iv) The net amount of the handler's payment, together with the price paid and the amount and nature of any deduction;

(2) Such other information with respect to receipts and utilization of butterfat and skim milk as the Market Administrator shall prescribe.

(b) . . .

(c) Each handler operating a partially regulated distributing plant who does not elect to make payments pursuant to § 1004.76(b) shall report the same information as required in paragraph (a) of this section with respect to dairy farmers from whom he receives milk.

7 CFR Part 1000—General Provisions, of Federal Marketing Orders

§ 1000.5 Handler responsibility for records and facilities.

Each handler shall maintain and retain records of his operations, and make such records and his facilities available to the Market Administrator. If adequate records of a handler, or of any other persons, that are relevant to the obligation of such handler are not

maintained and made available, any skim milk and butterfat required to be reported by such handler for which adequate records are not available shall not be considered accounted for or established as used in a class other than the highest priced class.

(a) Records to be maintained. (1) Each handler shall maintain records of his operations (including, but not limited to, records of purchases, sales, processing, packaging, and disposition) as are necessary to verify whether such handler has any obligation under the order, and if so, the amount of such obligation. . . .

(2) Each handler shall keep such other specific records as the Market Administrator deems necessary to verify or establish such handler's obligation under the order.

(b) Availability of records and facilities. Each handler shall make available all records pertaining to such handler's operations and all facilities the Market Administrator finds are necessary for such Market Administrator to verify the information required to be reported by the order and/or to ascertain such handler's reporting, monetary or other obligation under the order. . . .

FINDINGS OF FACT

1. Petitioner, Valley Farms, Inc., is a handler of milk as defined in section 1004.9 of the Order.

2. Petitioner's principal place of business is located at 1860 East Third Street, Williamsport, Pennsylvania, where petitioner operates a milk processing plant.

3. The predecessor of the petitioner, Foodcraft, Inc., conducted a partially regulated plant in Sunbury, Pennsylvania, as early as 1974. In 1979, Petitioner came into being as a result of a merger with Foodcraft, Inc., and continues to process its milk as a partially regulated plant.

4. Petitioner markets fluid products in 23 counties of north central Pennsylvania, but only 3 counties, namely, Dauphin, Perry and Juniata, are regulated under the Order.

5. Auditors for the Market Administrator of Order No. 4 sought to examine all of the books and records of the petitioner. At that time petitioner claims it was a party to a rulemaking proceeding involving proposals to redefine Federal Orders No. 2 and No. 4, to regulate areas in which petitioner markets its milk. Petitioner objected to the request to audit for the reason that petitioner believed that information gathered from a dairy becomes public information after an audit and may be used at the rulemaking hearing to petitioner's detriment. It was petitioner's position that the extension of the Order into its area would increase the petitioner's blend price

if the petitioner's entire operation were fully regulated under Order No. 4 and Order No. 2.

6. Petitioner refused to permit the Market Administrator to examine the records he requested until the United States District Court in Pennsylvania ordered petitioner to do so in June 1985. Petitioner had no objection to the examination of its records concerning its sales in the three counties presently regulated under Order No. 4.

7. In 1983 the Secretary of Agriculture conducted a formal rulemaking proceeding to consider amending Orders 4 and 2.

8. The Market Administrator, Order No. 4, took no position on any of the proposals at that proceeding. (Tr. 36)

9. The Secretary did not use or introduce in that proceeding any information traceable in any way to petitioner. (Tr. 36)

10. The general statistical information introduced by the Market Administrator at the rulemaking proceeding is obtained from handlers' reports. (Tr. 40, 41)

11. On the basis of a field survey audit, the Market Administrator discovered that milk packaged by petitioner and distributed in four stores within the marketing area, had not been reported by petitioner. (Tr. 36, 37)

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. The following conclusions are based upon the record evidence and applicable statutory and regulatory provisions enumerated herein.

1. The Act authorizes the Secretary, through his agent the Market Administrator, to examine any records of a handler, such as petitioner, which the Secretary needs to determine the petitioner's obligations under the Order. 7 U.S.C. 608d(1). The Secretary has promulgated regulations to carry out this authority. 7 CFR 1000.5, 1004.30.

2. The Act prohibits the Market Administrator from using specific, identifiable information obtained from a handler in an audit, in a proceeding to amend an Order. 7 U.S.C. 608d(2).

3. The confidentiality of petitioner's records is not violated by the conduct of an audit by the Market Administrator during the pendency of a proceeding to consider amending an order.

4. The relief requested by petitioner should be denied.

DISCUSSION

I

The handler's burden to establish, by way of reports and records, his utilization of milk has been repeatedly affirmed by the Court and Judicial Officer.

> "Thus the system imposes a primary obligation upon all handlers to make complete and accurate reports of their milk purchases and utilization, and a secondary obligation upon such handlers as are disclosed by those reports to be indebted to the Fund to pay the amounts found due. It is obvious that the successful operation of the system depends upon their prompt compliance with these requirements, (1) to make reports from which the administrator obtains the data upon which to base the uniform price and ascertain which handlers shall pay into the Fund and which receive payments therefrom, and (2) to make such payments as are called for by the administrator. . . ." *United States* v. *Turner Dairy Co.*, 162 F.2d 425, 426 (CA 7, 1947), *cert den.* 332 U.S. 836 (1947).

> "The emphasized language of Sec. 927.44 of the Order would seem to place the burden of establishing that the skim milk has been "otherwise utilized or disposed of" on the handler. Only the records of the handler or his consignees will show this. Any endeavor to place this burden on the Market Administrator would be unrealistic, if not futile. . . .

> "Nor is there merit in the contention of the plaintiff that the Market Administrator's ruling places a burden of proof on the handler at a non-pool plant. The burden is categorically placed on the pool plant handler, though the records of the non-pool plant must be relied on to sustain the burden of proving that the skim milk did not ultimately enter the marketing area. That ways and means of evading the prohibition of such entry may be resorted to, does not invalidate the requirement. . . ." *Newark Milk & Cream Co.* v. *Benson*, (D. N.J. 1959) 19 A.D. 54, 57 *aff'd.* 287 F.2d 681, (CA 3. 1961)

> "The order requires the handler to make reports to the Market Administrator showing the milk handled and the classes in which it was used, under the terms of the order. All milk is placed in Class One by the Market Administra-

tor unless proof be furnished by the handler of its use in Class Two. Any arbitrary action of the Market Administrator in rejecting proof of proper classification is reviewable. A similar provision in a milk order was approved in *United States* v. *Ridgeland Creamery Co.*, D.C. 47 F.Supp. 145, loc. cit. 149. The provision as to burden of proof appears to this Court a reasonable and fair method of determining classification of milk. The handler is in possession of all facts and records upon which knowledge as to the use of milk and the grades in which it should be placed, must be based. Why shouldn't the burden be placed in such hands, so that upon the basis of facts showing the use of milk, the handler can furnish the evidence reasonably necessary to the Market Administrator? Under such circumstances, it certainly would be an unusual and awkward regulation to place the burden upon the Market Administrator. Such a provision in the marketing order is a part of the method prescribed by the Administrator for the classification of milk and we find nothing in its terms contrary to the Act." . . . *Bailey Farm Dairy Co., et al* v. *Jones*, 61 F. Supp. 209, 225, (E.D. Mo. 1945), *aff'd* 157 F.2d 87 (CA 8, 1946) *cert den.* 329 U.S. 788.

"Petitioners have another grievance in that they seek Class III-C for some cream that they contend did not come to the International plant but went directly from the 60th Street Station in the City of New York to Country Club and Costa. The auditors and the Market Administrator allowed as Class III-C the cream for which there were supporting tickets or documents showing the direct movement claimed. The auditor was diligent in searching for such documents. Oral testimony either to the Market Administrator or in this proceeding is not an adequate substitute for the keeping of records from which the classification claimed can be verified. *Hogansburg Milk Company, Inc.* v. *Marvin Jones, War Food Administrator,* U. S. District Court, N.D. N.Y., March 16, 1946,* affirming In re Hogansburg Milk Company, Inc., 4 A.D. 285 (1945). . . ." *In re Dellwood Dairy Co., Inc., et al*, 6 A.D. 1107, 1120 (1947).

"Ogden claims first that its reports should have been accepted by the Market Administrator. Section 941.3(b) of the order requires the Market Administrator to "verify" handlers' reports by audit of handler's records. To "verify" means to establish the truth of, or to confirm. It seems ob-

vious that in the absence of supporting records, and in view of the results of the sampling by the Market Administrator Ogden's reported butterfat utilization should not have been accepted . . ." *In re Ogden Dairy Company* 2 A.D. 494 (1943), *aff'd. Ogden Dairy* v. *Wickard* 157 F.2d 445.

II

All Records Of A Regulated Handler Are Subject To Audit

A handler, such as petitioner, must file reports every month detailing, *inter alia*, its distribution and utilization of milk. 7 CFR 1004.30 and 32. From these reports the Market Administrator makes a preliminary determination of the handler's obligations under the order. (Tr. 42) That determination is then adjusted where necessary based on a subsequent audit. (Tr. 43) *In re Hygenic Dairy Company, et al.*, 9 A.D. 693, 700.

The Market Administrator must determine whether a handler operates a fully or partially regulated pool plant. As explained below, he must be able to see records of all of a handler's operations to do this. (Tr. 34)

One of the key elements of the Order is a producer-settlement or equalization fund ("fund"). (7 CFR § 1004.70) Handlers must account to this fund based on their disposition of milk. (7 CFR §§ 1004.71, 72) Because this fund is used to equalize the obligations of all handlers based on their usage of milk and to compensate producers equitably, any handler's inaccurate reporting impacts throughout the order.

A handler which operates a fully regulated plant must account to the fund for all of its Class I and Class II disposition within and outside the Order area, while a handler operating a partially regulated plant need equalize only its in-area Class I disposition. The Market Administrator determines a handler's status, under the terms of the Order, based on the percentage of its Class I disposition that is within the Order area. If 15 percent or more of a handler's Class I disposition is within the Order area, the handler is fully regulated (provided 30 or 40 percent or more of its volume is disposed of as Class I). (7 CFR § 1004.7).

To make such a percentage calculation, the Market Administrator must know the handler's total receipts and disposition, as well as the quantity of in-area and out-of-area disposition. In addition, all of a handler's other obligations under the Order are predicated on an accurate accounting of its sales and other dispositions.

The Market Administrator must be able to examine a variety of records in order to verify a handler's reports. (Tr. 35) Just as the

Internal Revenue Service may need to look at bank records, account ledgers, and many other items to verify a tax return, there are records such as load sheets and accounts receivable that can be used to verify milk reports. The Judicial Officer, in the *Hygenic Dairy* case, *supra* at 700, held: "The extent of the auditing necessary to verify reports is largely a matter of discretion with the Market Administrator. . . ."

Petitioner urges (brief pp. 3-4) that since only 6% to 8% of its total sales and only 3 of 23 counties are covered by Order No. 4, all of the books and records, including the general ledger, should not be made subject to review by the auditors of the Federal Market Administrator. Petitioner contends further that this is especially true when it is a party to a proposal to extend the jurisdiction of either Federal Order No. 4 or No. 2 to all of its operations, "for the reason that such an audit would reveal information that could be used in testimony at hearings that would be adverse to the Petitioner and beneficial to the proponents of the extension of the Order." However, petitioner's argument has no merit, and should not deter the necessary administration of the Order.

Whether or not a handler is fully or partially regulated depends on the *percentage* of its total milk which is distributed within the Order area. The Market Administrator determines this by dividing a handler's total distribution into its in-area distribution. 7 CFR 1004.7(a), 1004.8(c), and 1004.9(a)(2). This cannot be done unless the Market Administrator knows and can verify petitioner's total distribution. Whether a handler is fully or partially regulated depends on all of the information obtained in the audit. The Order provides standards which establish what the Market Administrator must know, *e.g.*, petitioner's total receipts and distribution, while the Act sets out the sort of documentation he may examine.

Petitioner's reliance on the *Lehigh Valley* and *Willow Farmers* cases is unavailing. While *Lehigh Valley* (370 U.S. 76) is a case which dealt with trade barriers and milk pricing; this case involves the Secretary's authority to conduct an audit of a regulated handler's books and records. The *Willow* case (90 F. Supp. 195) involved the question of the adequacy of the records maintained by the handler, and not a refusal to make records available.

In addition, the audit is necessary to verify a handler's obligation to the pool. (Tr. 34, 42) Petitioner admits that at one point it failed to report all of its in-area sales. (Tr. 30) The Market Administrator's testimony is that the only way to uncover such errors in petitioner's reports is to conduct a complete audit. (Tr. 35, 37) Because a business has many potentially corroborative or conflicting

records the Secretary must be able to see all the records, as evidenced by the following exchange:

> Q. How can you verify the information or the reports that you received if you cannot see records relating to all of the sales and receipts of a given handler? (Emphasis added.)
>
> Mr. SHINE: We can't. (Tr. 35)

III

Confidentiality Of The Petitioner's Records

The Secretary conducted a formal rulemaking proceeding pursuant to the Act (7 U.S.C. § 608c(3)(4)) and the Administrative Procedure Act (5 U.S.C. §§ 553, 556). Such proceeding is governed by the Rules of Practice set out in 7 CFR § 900.1-18. There is no connection between the Market Administrator's administration and enforcement of the Order's provisions via an audit and a rulemaking proceeding. The Act prohibits all officers and employees of the Department from releasing any information relating to an individaul handler furnished under section 8d(1) in, *inter alia*, a rulemaking proceeding. Violation of this prohibition is a criminal offense with penalties of up to $1,000 or one year in prison, or both. 7 U.S.C. § 608d(2). Cf: *United States* v. *Levine* 129 F.2d 745 (CA 2, 1942).

The Market Administrator provides only general statistical evidence at a rulemaking proceeding. (Tr. 36) These statistics are not "traceable or identifiable in any way by individual handler." (Tr. 36) Moreover, the statistics are compiled from the handler's monthly reports. (Tr. 41)

Because the statistical information submitted at a rulemaking proceeding is not traceable to an individual handler, the pendency of such a proceeding cannot violate the confidentiality of petitioner's records.

ORDER

The relief requested by petitioner is denied.

This decision and order shall be final and effective 35 days after service upon petitioner unless appealed to the Judicial Officer within 30 days. (7 CFR 900.64(c), 900.65)

Copies hereof shall be served on the parties.

[Decision and Order became final May 23, 1986—Ed.]

DISCIPLINARY DECISIONS

In re: MORGAN OUTLAW, AQ Docket No. 241. Decided May 2, 1986.

Interstate movement infectious animal—Civil Penalty—Consent.

Kevin Thiemann, for complainant.
Michael W. Lonsberry, Monticello, AR, for respondent

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Morgan Outlaw, respondent, violated the Act and regulations promulgated thereunder (7 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Morgan Outlaw, respondent, is an individual whose address is Rt. 1 Box 237, Hamburg, Arkansas 71646.

2. On or about August 4, 1984, the respondent moved one (1) equine infectious anemia reactor horse from Hamburg, Arkansas, to Bastrop, Louisiana.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred fifty dollars ($150.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, 12th and Independence Avenue, S. W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MARGY CANNON, AQ Docket No. 242. Decided May 5, 1986.

Interstate movement of infectious animal—Civil Penalty—Consent.

Kevin Thiemann, for complainant.
Louis B. Jones, Jr., Forrest City, AR, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, 122), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Margy Cannon, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(ç) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Margy Cannon, respondent, is an individual whose address is 836 Riverview #C-20, Jackson, Mississippi 39202.

2. On or about May 21, 1985, the respondent moved one (1) equine infectious anemia reactor horse interstate from Jackson, Mississippi, to Weldon, Arkansas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred fifty dollars ($150.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S.W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: LANCE TARVER and TOMMY COLEMAN, AQ Docket No. 221. Decided March 26, 1986.

Brucellosis exposure, no accompanying figures—Civil Penalty—Default.

Fronda Woods, for complainant.
Respondents, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that the respondents violated section 78.8 of the regulations promulgated thereunder (9 CFR § 78.8). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondents.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondents were informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Neither respondent filed an answer during the twenty-day period allowed. Respondents' failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondents' failure to file answers also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). As respondents are deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

Lance Tarver, respondent, is an individual whose address is Route 1, Box 666, Bossier City, Louisiana 71112.

Tommy Coleman, respondent, is an individual whose address is Route 2, Box 180, Marshall, Texas 75671.

On or about May 10, 1984, respondents moved three brucellosis exposed cattle from Bossier City, Louisiana, to Corsicana, Texas,

in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

4. On or about June 20, 1984, respondents moved fifteen brucellosis-exposed cattle from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

5. On or about January 27, 1984, respondents moved at least one brucellosis-exposed cow from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cow was not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

6. On or about May 31, 1984, respondent Tommy Coleman moved four brucellosis-exposed cattle from Bossier City, Louisiana, to Corsicana, Texas, in violation of 9 CFR § 78.8(a)(2), because the cattle were not accompanied by a VS Form 1-27 or an "S" brand permit, as required.

CONCLUSIONS

Respondents have failed to file answers to any of the allegations in the complaint. The consequences of such a failure were explained to the respondents in the complaint and in the letter of service that accompanied it. By their silence respondents have admitted all of the material allegations of fact in the complaint and have waived a hearing.

By reason of the Findings of Fact set forth above, respondents have violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

1. Respondent Lance Tarver is hereby assessed a civil penalty of one thousand five hundred dollars ($1500), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

2. Respondent Tommy Coleman is hereby assessed a civil penalty of two thousand dollars ($2000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Default Decision and Order became final on May 6, 1986, for respondent Lance Tarver, and became final on May 19, 1986, for respondent Tommy Coleman.]

In re: JIM DOSS, RONALD O. EHRLICH and DR. PHILLIP SMITH, D.V.M., AQ Docket No. 136. Decided May 9, 1986.

Interstate movement of animals—Civil Penalty—Consent.

Fronda Woods, for complainant.
Stow Witever, Jr., Greeley, CO, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION FOR RONALD O. EHRLICH

On December 14, 1984, this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint, alleged, *inter alia*, that Ronald O. Ehrlich, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that the proceeding with respect to respondent Ronald O. Ehrlich should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Ronald O. Ehrlich specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the pro-

ceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Ronald O. Ehrlich, respondent, is an individual whose address is P.O. Box 60, Milliken, Colorado 80543.

2. On or about June 7, 1984, respondent caused to be moved at least one cow from Abilene, Texas to Milliken, Colorado.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of the proceeding. Therefore, such order will be issued.

ORDER

The respondent is assessed a civil penalty of one hundred dollars ($100) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: BONNIE LAMBETH, AQ Docket No. 231. Decided May 14, 1985.

Interstate movement of animals—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Damon Young, Texarkana, AR, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent, Bonnie Lambeth, violated the Act and regulations promulgated thereunder (9 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be termi-

nated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, Bonnie Lambeth, specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent, Bonnie Lambeth, also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bonnie Lambeth, respondent, is an individual whose address is Route 2, Box 436, DeQueen, Arkansas 71832.

2. On or about February 15, 1985, the respondent moved interstate an EIA reactor horse from DeQueen, Arkansas, to Idabel, Oklahoma.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: TEXAS LIVESTOCK MARKETING ASSOCIATION, INC., DUDE HARRISON and A. J. LINDSEY, AQ Docket No. 141. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Clement McGovern, for complainant.
Linda Goehman Smith, Fort Smith, TX, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. Section 111 and Section 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Texas Livestock Marketing Association, Inc., A. J. Lindsey and Dude Harrison violated the Act and regulations promulgated thereunder (9 CFR Section 71.1 *et. seq.*). The respondents and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or basis thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by them in connection with this proceeding.

FINDINGS OF FACT

1. Respondent Texas Livestock Marketing Association, Inc., is a corporation incorporated under the laws of the State of Texas and having its principal place at Union Stock Yards, P. O. Box 1227, San Antonio, Texas 78924.

2. Respondents Dude Harrison and A. J. Lindsey are individuals whose address is Union Stock Yards, P. O. Box 1227, San Antonio, Texas 78294.

3. On or about November 7, 1983, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

4. On or about March 13, 1984, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

5. On or about May 14, 1984, respondents moved cattle interstate from San Antonio, Texas, to Plant City, Florida.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondents are assessed a civil penalty of six thousand dollars ($6,000.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day of the service upon the respondents.

re: JOHNNY DOBSON, AQ Docket No. 251. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Ejiri, for complainant.
dent, *pro se*.

on by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint

filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Johnny Dobson violated the Act and regulations promulgated thereunder (9 CFR Part 78). Respondent Johnny Dobson and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Johnny Dobson admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Johnny Dobson also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Johnny Dobson, respondent, is an individual whose address is Route 6, Box 503, Sulphur Springs, Texas 75482.

2. On or about January 3, 1985, the respondent moved interstate from Paris, Texas, to Omaha, Nebraska, approximately two cattle.

CONCLUSIONS

Respondent Johnny Dobson having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Johnny Dobson is assessed a civil penalty of one hundred fifty dollars ($150.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Depart-

ment of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Order shall become effective upon service of the respondent.

In re: JIMMY HUGHES, AQ Docket No. 253. Decided May 20, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Sherrie Kennedy, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, admits the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the Respondents in connection with this proceeding.

FINDINGS OF FACT

1. Jimmy Hughes, herein referred to as the respondent, is an individual whose address is 206 Robin Way, Mt. Vernon, Texas 75457.

2. On or about May 16, 1985, the respondent moved interstate at least one (1) cow from Giles and Stratton Auction, Inc. in Bossier City, Louisiana, to Paris Livestock Commission Company in Paris, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Decision and Order will be issued.

ORDER

1. The Respondent, Jimmy Hughes, is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Sherrie Kopka Kennedy, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

2. This order shall become effective on the day upon which service of this Order is made upon the Respondent.

In re: CLARK BUFORD, AQ Docket No. 244. Decided May 23, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act), (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Clark Buford violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). Respondent Clark Buford and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Clark Buford admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies

the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Clark Buford also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Clark Buford, respondent herein, is an individual whose address is Route 3, Box 516, Cordele, Georgia 31015.

2. On or about January 29, 1985, the respondent moved at least 12 cattle from Arabi, Georgia, interstate to Roanoke, Alabama.

CONCLUSIONS

Respondent Clark Buford having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Clark Buford is assessed a civil penalty of one thousand dollars ($1,000.00) which shall be payable to "The Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, on or before May 30, 1986.

This Decision and Order shall become effective on the day it is filed by the Administrative Law Judge with the Hearing Clerk.

In re: ROBERT "BOB" CODY, AQ Docket No. 252. Decided May 29, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111 and § 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Robert "Bob" Cody violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) Respondent Robert "Bob" Cody and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Robert "Bob" Cody admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Robert "Bob" Cody also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Robert "Bob" Cody, respondent herein, is an individual whose mailing address is Route 4, Box 9, Sulphur Springs, Texas 75482

2. On or about December 6, 1984, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately three (3) cattle.

3. On or about December 13, 1984, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately four (4) cattle.

4. On or about January 3, 1985, the respondent moved interstate from Paris, Texas, to Durant, Oklahoma, approximately two (2) cattle.

CONCLUSIONS

Respondent Robert "Bob" Cody having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order, in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Robert "Bob" Cody is assessed a civil penalty of seven hundred fifty dollars ($750.00) which shall be payable to the "Treasurer of the United States," by check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: DONALD CONRAD, AQ Docket No. 235. Decided June 3, 1986.

Interstate movement of postparturient cattle—Civil Penalty—Consent.

Clement McGovern, for complainant.
Gene Krekel, Burlington, IA, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the

Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Donald Conrad, herein referred to as the respondent, is an individual whose address is Route 1, West Point, Iowa 52656.

2. On or about June 17, 1985, the respondent moved interstate 11 postparturient cows and 11 calves from Wyaconda, Missouri, to West Point, Iowa.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

Respondent is assessed a civil penalty of seven hundred dollars ($700.00) which shall be payable to the "Treasurer of the United States," by certified check or money order, and which shall be forwarded to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Decision and Order.

This Decision and Order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GUTMAN BROTHERS, LTD., AQ Docket No. 225. Decided June 17, 1986.

Interstate movement of cattle, no documents—Civil Penalty.

Jaru Ruley, for complainant.
Joseph Nelkin, Baltimore, MD, for respondent.

Decision by Donald A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing the interstate movement of cattle to prevent the spread of brucellosis (9 CFR §§ 71.18 and 78.1 *et seq.*). An initial Decision and Order was issued on March 17, 1986, by Administrative Law Judge Victor W. Palmer (ALJ) assessing civil penalties totalling $2,500.

On April 21, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[1] The case was referred to the Judicial Officer for decision on June 9, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 71.18 and 78.1 *seq.*), hereinafter referred to as the regulations, in accordance

with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was initiated by a complaint filed on December 23, 1985, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on two separate occasions the respondent transported cattle interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of sections 71.18 and 78.9(a) of the regulations (9 CFR §§ 71.18 and 78.9(a)). On or about April 10, 1984, the respondent moved at least eleven cattle interstate without a certificate or an owner's or shipper's statement, or other acceptable document, containing prescribed information. Then on or about March 20, 1985, the respondent moved nine cattle interstate without proper identification by either Department-approved backtags or Animal and Plant Health Inspection Service-approved eartags and without being accompanied by a certificate or an owner's or shipper's statement, or other acceptable document, containing prescribed information. In his answer, the respondent failed to deny or otherwise respond to any of the material allegations contained in the complaint, thereby, for the purposes of this proceeding, being deemed to have admitted the allegations and waived a hearing. (See 7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Gutman Brothers, Ltd., is a corporation incorporated under the laws of the State of Maryland and having its principal office address at 5905 Simmonds Avenue, Baltimore, Maryland 21215.

2. On or about April 10, 1984, the respondent moved at least eleven cattle, over two years of age, interstate from Hagerstown, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not accompanied interstate by an owner's or shipper's statement, or other acceptable document, containing prescribed information.

3. On or about April 10, 1984, the respondent moved at least eleven cattle, over two years of age, interstate from Hagerstown, Maryland, to Codorus, Pennsylvania, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)) in that the cattle were not accompanied interstate by a certificate, as required.

4. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not accompanied interstate by an owner's or shipper's statement, or other acceptable document, containing prescribed information.

5. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle were not properly identified by either Department-approved backtags or Animal and Plant Health Inspection Service-approved eartags, as required.

6. On or about March 20, 1985, the respondent moved nine cattle, over two years of age, interstate from Hagerstown and Smithburg, Maryland, to Codorus, Pennsylvania, in violation of section 78.9(a) of the regulations (9 CFR § 78.9(a)) in that the cattle were not accompanied interstate by a certificate, as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 71.18 and 78.9(a) of the regulations (9 CFR §§ 71.18 and 78.9(a)).

Therefore, the following Order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to deny or otherwise respond to the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 CFR §§ 1.136(a)-(c), .139):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

* * * * * * *

§ 1.139 *Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

The complaint filed in this case advised respondent that "Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of such allegation" (Complaint at 3). In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent enclosed a copy of the rules of practice and expressly advised respondent that failure to "plead specifically to any allegation of the complaint shall constitute an admission of such allegation." The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which

to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Notwithstanding these explicit directions and warnings, respondent filed an answer which states in its entirety: "In reply to your letter of Dec.20.85 we kindly request an oral hearing in the above matter." Accordingly, the ALJ's entry of a default Decision and Order was clearly warranted. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,[2] respondent has shown no basis for setting aside the default decision here.[3] The rationale for the Department's position in this respect is stated in *In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986), as follows:

[2] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3] *See In re Daul*, 45 Agric. Dec. ___ (Mar. 6, 1986); *In re Cuttone*, 44 Agric. Dec. ___ (Aug. 20, 1985); *In re Corbett Farms, Inc.*, 43 Agric. Dec. ___ (Nov. 1, 1984); *In re Jacobson*, 43 Agric. Dec. ___ (June 26, 1984); *In re Buzun*, 43 Agric. Dec. ___ (June 13, 1984); *In re Mayer*, 43 Agric. Dec. ___ (Apr. 12, 1984) (decision as to respondent Doss), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. ___ (Jan. 4, 1984); *In re Berhow*, 42 Agric. Dec. 764 (1983); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order not set aside where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order not set aside where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 421 cases. The Department's Judicial Officer (who does not have a law clerk) disposed of 45 cases (including one on remand from the Seventh Circuit that required a 529-page decision to justify an 8-month suspension order and a $10,000 civil penalty for 14 separate livestock violations based on circumstantial evidence). Last month, 66 new cases were filed with the Hearing Clerk. The Department does not have the time or resources to hold a hearing at this late date for this respondent, who did not file a timely answer and did not choose to "set forth any explanation at this time" when his (untimely) answer was filed.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [5] If respondent were permitted to raise the defenses which he explained for the first time on appeal to the Judicial Officer, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to raise these defenses at this time.

[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co.* v. *United States*, 308 F.2d 849, 851–52 (7th Cir. 1962).

For the foregoing reasons, the following order should be issued in this proceeding.

ORDER

Respondent, Gutman Brothers, Ltd., is hereby assessed a civil penalty of $2,500 ($500 per violation). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Bldg., United States Depart

ment of Agriculture, Washington, D.C. 20250-1400, within 30 days from the service of this order.

In re: GORDON GIBSON, AQ Docket No. 250. Decided June 17, 1986.

Interstate movement of cattle—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Lonnie Turner, Ozark, AR, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Gordon Gibson violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.* and § 78.1 *et seq.*). Gordon Gibson and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth below and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Gordon Gibson admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Gordon Gibson also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Gordon Gibson, respondent, is an individual whose address is Route 1, Box 301, Hartman, Arkansas 72842.

2. On or about October 29, 1984, the respondent moved interstate from Coal Hill, Arkansas, to Moffett, Oklahoma, approximately five cattle.

CONCLUSIONS

Respondent Gordon Gibson having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Gordon Gibson is assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to, "The Treasurer of the United States," by certified check or money order and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This Decision and Order shall become effective upon service of the respondent.

In re: BILLY E. ROWAN, AQ Docket No. 187. Decided April 14, 1986.

Interstate shipment of infectious animals—Default—Civil Penalties.

Sally Stratmoen, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120, and 122) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was filed with the Hearing Clerk on June 25, 1985. The complaint alleged that the respondent violated sections 78.9(d)(3) and 75.4(c) of the regulations (9 CFR §§ 78.9(d)(3) and 75.4(c)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on July 1, 1985. On July 26, 1985, respondent was sent, by regular mail, a notice that his answer had not been received by the Hearing Clerk in the allotted time.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the com-

plaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to deny or otherwise respond to the allegations in the complaint and request an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Billy E. Rowan, respondent, is an individual whose mailing address is Route 1, Box 357, New Albany, Mississippi 38652.

2. On or about April 2, 1984, the respondent moved interstate at least one (1) bull from Miller Livestock Company located in Quincy, Louisiana, within a Class C state, to Grenada Livestock Exchange located in Grenada, Mississippi, which moved other than in accordance with the applicable regulations because the bull was not accompanied by a certificate or other document, as required by section 78.9(d)(3) of the regulations. (9 CFR § 78.9(d)(3))

3. On or about June 9, 1984, the respondent shipped two (2) equine infectious anemia reactor horses, named Domino and Casey, from the Lipscomb Brothers Horse Sale located in Como, Mississippi, to the White Horse Sale located in Moulton, Alabama, in violation of section 75.4(c) of the regulations (9 CFR § 75.4(c)) because the horses moved interstate other than to an approved slaughtering establishment for immediate slaughter or to a designated diagnostic or research facility, as required.

rie Kopka Kennedy, U. S. Department of Agriculture, Office of the General Counsel, Room 2422, South Building, Washington, D. C. 20250-1400.

This Order shall have the same force and effect as if issued after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal within 30 days to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 17, 1986.—Ed.]

In re: WILLIAM C. FILSINGER, DVM, VA Docket No. 37. Decided May 12, 1986.

Violation of Accreditation Standards—Suspension.

Sherrie Kennedy, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR § 160.1 *et seq.*), by a Complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint was filed with the Hearing Clerk on February 6, 1986. The Complaint alleged that Respondent violated the Standards for Accredited Veterinarians (Standards) (9 CFR § 161.2).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on February 21, 1986.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Respondent was informed in the Complaint and the letter of service that an Answer should be filed with the Hearing Clerk within twenty (20) days after service of the Complaint, and that failure to file an answer either denying or otherwise responding to the allegations in the Complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. On March 20, 1986, Respondent was sent, by regular mail, a notice that his Answer had not been received by the Hearing Clerk in the allotted time. More than

twenty (20) days have elapsed since Respondent was served with the Complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an Answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Dr. William C. Filsinger, respondent, is an individual whose mailing address is Route 5, Box 335A, Cumberland, Maryland 21502.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Maryland under the provisions of the regulations of Title 9, Code of Federal Regulations, Part 160-162.

3. On or about April 14, 1982, April 26, 1983, and May 8, 1984, respondent brucellosis and tuberculosis tested cattle for Deremer Brothers Dairy located in Keyser, West Virginia in violation of paragraph (d) of the Standards (9 CFR § 161.2(d)) because the testing was not done in accordance with instructions issued to the respondent by the Veterinarian in Charge or the State Animal Health Official, or both, which instructions permit such testing only in States in which a veterinarian is accredited.

CONCLUSION

By reason of the facts in the findings of fact set forth above, Respondent has violated the Standards for Accredited Veterinarians. Therefore, the following Order is issued.

ORDER

Respondent's veterinarian accreditation is hereby suspended for a period of three (3) months, provided that, if the Respondent performs any actions during such suspension for which veterinary accreditation is required, then Respondent's veterinary accreditation shall be revoked. Before such action is taken, Respondent will be afforded an opportunity for a hearing concerning the matter.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Default Decision and Order became final and effective on June 20, 1986—Ed.]

In re: LONGINO HALLEY, SR., AQ Docket No. 258. Decided June 30, 1986.

Fed or permitted feeding of untreated garbage to swine—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Swine Health Protection Act, as amended (Act) (7 U.S.C. § 3801 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Longino Halley, Sr. violated the Act and regulations promulgated thereunder (9 CFR § 166.1 *et seq.*). Longino Halley, Sr. and the complainant agree that this proceeding should be terminated by entry of the Consent Decision set forth and agree to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Longino Halley, Sr. admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Longino Halley, Sr. also waives any action against the United StatesDepartment of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Longino Halley, Sr., respondent, is an individual whose mailing address is 317 Chicago Boulevard, Lake Village, Arkansas 71653.

2. From on or about January 23, 1985, to May 1, 1986, the respondent operated a facility for the treatmet of garbage to be fed to swine.

3. From on or about January 23, 1985, to May 1, 1986, the respondent fed or permitted the feeding of garbage to swine at his facility in Lake Village, Arkansas.

CONCLUSIONS

Respondent Longino Halley, Sr. having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent Longino Halley, Sr. is assessed a civil penalty of two thousand dollars ($2,000.00). However, the civil penalty shall be held in abeyance so long as the,

1. respondent does not operate a facility for the treatment of garbage knowing it is to be fed to swine unless respondent holds a valid permit issued pursuant to the Act; and

2. respondent does not feed or permit the feeding of garbage to swine except in accordance with the Act and regulations promulgated thereunder (9 CFR § 166.1 *et seq.*).

And Provided Further, that if it is determined after an opportunity for hearing, as provided in the Rules of Practice (7 CFR § 1.131 *et seq.*) that any term or provision of the Order has not been, or is not being, complied with, the civil penalty held in abeyance shall be withdrawn and the $2,000.00 shall be due immediately.

This Consent Decision and Order shall become effective on the day of service upon the respondent.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: HORACE R. COX, AQ Docket No. 160. Decided May 1, 1986.

Complaint dismissed.

Robert Broussard, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Horace R. Cox on March 27, 1985, is herewith dismissed.

In re: DOUG SASSEEN, and RANDALL HOOVER, d/b/a OZARKS REGIONAL STOCKYARD, AQ Docket No. 229. Decided May 30, 1986.

Complainant's motion—Dismissed.

Fronda Woods, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed May 23, 1986,

IT IS ORDERED, that the complaint issued in this matter on January 21, 1986, be, and hereby is, dismissed.

DISCIPLINARY DECISIONS

In re: MARLIN U. ZARTMAN, d/b/a GILBERTSVILLE SALES STABLES, AWA Docket No. 292. Decided March 21, 1986.

Failure to maintain adequate program of disease control and veterinary care, evidenced by acceptance of sick animals for sale—Civil Penalty—Cease and desist from accepting sick animals.

Robert Ertman, for complainant.
Dennis L. O'Connell, Gilbertsville, PA, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

The complainant alleges that respondent on two occasions, March 17 and 31, 1984, ". . . failed to maintain an adequate program of disease control and veterinary care, as evidenced by the acceptance of sick animals . . . for sale." Complainant's paragraphs 4 and 5.

On March 17, 1984 respondent had six cats found by complainant's inspectors to be exhibiting clear symptoms of mild contagious illness (something akin to a common cold in a human being, with symptoms of a running nose and eyes).

Then, on March 31, 1984 complainant's inspectors found two rabbits, a cat, a guinea pig, and a dog exhibiting symptoms of minor illness, possible injury, and/or disease. The evidence does not establish any serious condition, disease or injury.[1]

These animals constitute a very tiny fraction of the 280 animals at the auction on March 17, and 398 animals on March 31, 1984.

Further, the symptoms of the illness or injury were sufficiently clear to give fair warning to respondent's employees that the animals were not healthy at time they were accepted earlier that day.

Complainant contends that the acceptance of these animals for sale at the auction constitute violation of a duty to maintain an adequate program of disease control and veterinary care at the auction. (9 CFR 3.10(a), 3.34(a), and 3.59(a). These provisions are identical, but apply to dogs and cats (Subpart A), guinea pigs and hamsters (Subpart B), and rabbits (Subpart C), of Part 3 (Standards)). (9 CFR 3.1)

It is concluded that if respondent had maintained an adequate program for disease control and prevention, his employees would not have accepted these animals.

[1] For example, they range from several sick cats (with pnemonities, a running nose and eyes like a common cold in people), a sick dog, a couple sick rabbits and a guinea pig with sores on its back.

The regulations are not fully satisfied by having a veterinarian inspect the animals shortly before sale. The regulations do not limit respondent's duty to avoid *sale* of sick, diseased, or injured animals, but require respondent to *maintain a program to control and prevent disease from existing or spreading.*

> "Programs of disease control and prevention, euthanasia, and adequate veterinary care shall be established and maintained under the supervision and assistance of a doctor of veterinary medicine." 9 CFR 3.10(a), 3.34(a) and 3.59(a).

Thus, the violations as charged in the complaint are established here.

Prior to the March 17 and 31, 1984 inspections, this respondent had been charged, inter alia, with similar minor violations. *In re Marlin D. Zartman d/b/a, Gilbertsville Sales Stables,* 44 Agric. Dec ___ (1985). (See slip opinion attached to respondent's reply brief, of the *Decision and Order* of the USDA Judicial Officer decision, AWA Docket No. 259, 2/27/85. ("*Zartman I*"). See also *Order Denying Petition for Reconsideration, In re Zartman et al* 44 Agric. Dec. ___ (1985) USDA JO decision, AWA Docket No. 259 filed 4/15/85. A copy of the slip opinion also is attached to Respondent's Reply Brief).

Trial of the issues in *Zartman I* case took place just two months before the March 17 and 31, 1984 inspections made here.

Respondent's counsel contends that the March 17-31 inspections were "retaliatory" in nature, prompted by the apparently successful defense that respondent had raised in *Zartman I, supra.* In fact, this impression proved to be accurate.

Respondent now claims a variety of investigational irregularities or illegalities by complainant's investigators, in particular reference to the March 31, 1984 investigation. These are irrelevant, immaterial and not of much substance, factually or legally, insofar as the merits are concerned—i.e., whether respondent violated the pertinent law and regulations.

Respondent presents a plausible argument in support of his "retaliatory" theory, but it cannot be used to offset a violation, if one exists. What weight or bearing it may have on the departmental sanction policy is not here argued or briefed.

Assuredly, a program of disease control and prevention need not be "perfect" in the sense that it *always* prevents a contagiously sick animal from being accepted at, for example, a busy weekly auction sale. *Zartman I, supra,* slip opinion page 13.

But this is the second such occurrence. Further, these violations happened when respondent and his employees should have been sensitive to the problem, just 60 days after a two day trial of that issue, inter alia.

Therefore, while the incidents of March 17 and 31, 1984 are not flagrant, they are repeated violations.[2]

In additional, respondent again raises here certain legal issues which were raised in *Zartman I* but not resolved at the time of this trial.

The USDA Judicial Officer disposed of those issues in *Zartman I* in a manner that is binding here.

> "At the outset, respondent raises a serious question as to whether the Secretary is authorized to promulgate standards applicable to the operator of an auction sale as to the care, treatment, housing, feeding, watering, and sanitation of animals."

Section 12 of the Act provides (7 U.S.C. § 2142):

> § 2142. *Humane standards and recordkeeping requirements at auction sales*
>
> The Secretary is authorized to promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals, in commerce, by dealers, research facilities, and exhibitors at auction sales and by the operators of such auction sales. The Secretary is also authorized to require the licensing of operators of auction sales where any dogs or cats are sold, in commerce, under such conditions as he may prescribe, and upon payment of such fee as prescribed by the Secretary under section 2153 of this title.

If § 12 of the Act is read by itself, no serious question is presented as the Secretary's authority. That is, the authority given to the Secretary to promulgate humane standards governing the "handling" of animals by operators of auction sales would clearly authorize the standards at the issue here.

[2] The complainant might on occasion issue only a warning to licensee, or, in appropriate circumstances, contingent upon the record of that licensee, issue an formal complaint, as was done here.

In addition, the Secretary is authorized by § 12 of the Act to license the operators of auction sales where dogs or cats are sick "under such conditions as he may prescribe." Dogs and cats are sold at respondent's auction, and the Secretary has prescribed that auction operators must comply with the standards for other animals subject to the Act, as well as dogs and cats (9 CFR § 2.100(a)). That is, one of the conditions the Secretary has prescribed is (9 CFR § 2.100(a)).

> § 2.100. *Compliance with standards.*
>
> (a) Each dealer, exhibitor, operator of auction sales, and research facility shall comply in all respects with the standards set forth in Part 3 of this subchapter setting forth the standards for the humane handling, care, treatment, and transportation of animals . . .

The "standards set forth in Part 3 of this subchapter" are the standards that are involved in this case (9 CFR § 3.1 *et seq.*). Hence, pursuant to the authority in § 12 of the Act, the Secretary has prescribed broad and exacting standards, applicable to all animals subject to the Act, that must be complied with by auction operators.

The legislative history of the Animal Welfare Act of 1970, which added the provisions as to auction operators, states as to § 12 (H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. 11 (1970))

> Section 13.—This section (i.e., § 12 of the Act) would also authorize the Secretary to license the operators of auction sales, where any dogs or cats are sold and such sales are affecting commerce. In addition, the section would extend the recordkeeping and standards of humane handling under the Act to the purchase, handling, and sale of animals, as defined in the bill, rather than only dogs or cats, at auction sales by dealers, research facilities, exhibitors and by the operators of the auction sales.

Hence it would appear from the literal language of § 12 and its legislative history that § 12 gives the Secretary broad authority to impose on auction operators standards of humane handling of all animals subject to the Act.

The ambiguity in this case arises when § 12 of the Act, quoted above, is read in conjunction with § 13 of the Act, which does not expressly apply to auction operators.[2] Section 13 provides (7 U.S.C. § 2143(a)):

> § 2143. *Humane standards for animals transported in commerce*
>
> (a) *Authority of Secretary to promulgate standards*
>
> The Secretary shall promulgate standards to govern the humane *handling, care, treatment,* and transportation of animals by dealers, research facilities, and exhibitors. Such standards shall include minimum requirements with respect to *handling, housing, feeding, water sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, temperatures, adequate veterinary care,* including the appropriate use of anesthetic, analgesic or tranquilizing drugs, when such use would be proper in the opinion of the attending veterinarian of such research facilites, and separation by species when the Secretary finds such separation necessary for the humane handling, care, or treatment of animals. The Secretary shall also promulgate standards to govern the transportation in commerce, and the *handling, care, treatment* in connection therewith, by intermediate handlers, air carriers, or other carriers, of animals consigned by any dealers, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or of any State or local government, for transportation in commerce. The Secretary shall have authority to promulgate such rules and regulations as he determines necessary to assure humane treatment of animals in the course of their transportation in commerce including requirement such as those with respect to *containers, feed, water, rest, venti-*

[2] "As noted by complainant, the Department has consistently construed the term "dealer" to include "auction operators." However, to say the least, some ambiguity arises from the fact that § 12 of the Act applies, inter alia, to "dealers" and "operators of such auction sales," whereas § 13 applies expressly to "dealers," but not the operators of auction sales."

lation, temperature, and handling. (Emphasis added.)

In § 13 of the Act, quoted immediately above, it would appear that the word "handling" is used in a manner that does not include "care," "treatment," "housing," "feeding," "watering," "sanitation," "ventilation," "veterinary care," and "shelter from extremes of weather and temperature." To construe the word "handling" in § 13 of the Act as broad enough to include all of such other terms would make the additional terms in § 13 surplusage. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule tht 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' " [sic] *Ex Parte Public Nat'l Bank of NY,* 8 U.S. 101, 104 (1928).

Nonetheless, this is remedial legislation "to insure that animals . . . are provided humane care and treatment" (7 U.S.C. § 2131(1)), and it has been the settled and contemporaneous construction of the Act by the administrative officials charged with the responsibility for achieving the congressional purpose that the Secretary has authority to impose on auction operators the standards involved in this proceeding. Although the issue is not free from doubt, I believe that the Secretary acted within his statutory authority." *Zartman I, supra* pages 3–7 of slip opinion.

The evidence sustains complainant's allegations that respondent on two occasions in March 1984 failed to maintain an adequate program of disease control and prevention as evidenced by the acceptance of contagiously sick animals in violation of regulations.

Nothing here shows a $600.00 civil penalty ($300 each for the March 17 and March 31, 1984 violations) as inappropriate or unwarranted, when consideration is given to the size of the business, the gravity of the violations, the good faith and history of prior violations, by this respondent.

Reliable, substantial and persuasive evidence establish is that respondent violated the regulations and statute as charged in the complaint.

ORDER

Respondent is assessed a civil penalty of $600.00 dollars ($300 for the March 17 and $300 for the March 31, 1984 violations).

Respondent shall pay this civil penalty by certified check or money order made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Marketing Division, Office of the General Counsel (Attention Robert A. Ertman) United States Department of Agriculture, Washington D.C. 20250.

This civil penalty shall be paid within 90 days from the date this Decision and Order becomes final.

Respondent shall cease and desist from accepting animals showing signs or symptoms of illness, disease or injury, in violation of his duty to establish and maintain a program of disease control and prevention.

This Decision and Order will become final without further proceedings thirty five (35) days after service unless appealed within thirty (30) days after service. (7 CFR 1.140(c) & 1.45(a)).

[Decision and Order became final on May 6, 1986.—Ed.]

In re: STATE UNIVERSITY OF NEW YORK, AWA Docket No. 346. Decided May 12, 1986.

Research facility—construction and maintenance of interior surfaces—proper storage of food and bedding—training program for handlers—Civil Penalty—Consent.

John Griffith, for complainant.
Sanford Levine, for respondent.

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent State University of New York has a mailing address of Office of University Counsel, State University Plaza, Albany, New York 12246.

2. At all material times herein, the respondent operated a research facility subject to and registered under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent State University of New York shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156 and the standards and regulations issued thereunder, 9 CFR §§ 1.1–3.142 and shall cease and desist from any violation thereof. In addition to complying with all other requirements of the Act, regulations and standards, respondent shall within ten (10) days of the effective date of this decision bring its animal care facility into compliance with the standards for the proper construction and maintenance of interior surfaces under 9 CFR § 3.2 and the proper storage of food and bedding under 9 CFR § 3.1.

Respondent shall establish and maintain a training program to assure that all individuals involved in the care and handling of animals or the maintenance of respondent's facility are given adequate training in the proper care and handling of animals and the proper maintenance and sanitation of animal care facilities as required by the Act, regulations and standards.

Respondent shall distribute a copy of this decision to all of its personnel who are responsible for the care and handling of research animals and the maintenance and sanitation of animal care facilities subject to the Act. Respondent shall maintain an ongoing information program to insure that such personnel are aware of the provisions of this decision.

Respondent shall, within thirty (30) days after the effective date of this order, send the Area Veterinarian in Charge a written report setting forth the steps it has taken to implement the requirements of this order.

Respondent is assessed a civil penalty of $1,500.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: LOGAN COLLEGE OF CHIROPRACTIC, AWA Docket No. 345. Decided May 23, 1986.

Research facility—failure to file annual report—Civil Penalty—Consent.

Robert Frisby, for complainant.
Michael P. Casey, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that the respondent violated the Act and the regulations issued pursuant to the Act, 9 CFR §§ 1.1–2.130. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in the complaint and specifically admits that the Secretary has jurisdiction in this matter, admits that it failed to file its annual report for 1984 by the fiscal year by December 1, 1984, but did file the report on December 14, 1984, denies the remaining allegations in the complaint, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Logan College of Chiropractic is a Missouri corporation and its mailing address is 1851 Schoettler Road, Chesterfield, Missouri 63017.

2. At all times material herein, respondent was registered under the Act as a Research Facility (Registration No. 43–32).

3. Respondent failed to file its annual report for the 1984 fiscal year by December 1, 1984, but did file the report on December 14, 1984.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Logan College of Chiropractic shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from failing to file annual reports in a timely manner with the APHIS as required by the Act and the regulations.

Respondent is assessed a civil penalty of $100 payable by certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: JIM and MARY FOSTER, d/b/a OAK LEAF KENNELS, AWA Docket No. 371. Decided May 30, 1986.

Dealers—engaged in business without a license—improper storage of food—improper sanitization of facilities—overcrowding—Civil Penalty—Consent.

Howard Haas, Mktg. Div., for complainant.
Mark S. Wasinger, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

The respondents Jim and Mary Foster are individuals doing business as Oak Leaf Kennels at Rt. 1, Montgomery City, MO 63361. The respondents, at all times material herein, were dealers within the meaning of the Act. The respondents, at all times material herein, were not licensed under the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

(1) Operating in any capacity for which a license is required under the Animal Welfare Act and the regulations issued thereunder without having applied for and obtained a license as required by the Act and the regulations;

(2) Failing to store food in containers for protection against infestation or contamination as required by 9 CFR § 3.1(c);

(3) Failing to ensure that the indoor building surfaces are impervious to moisture and in condition to be readily sanitized as required by 9 CFR § 3.2(d);

(4) Failing to ensure that dogs are not overcrowded in outside cages as required by 9 CFR § 3.4(b)(2); and

(5) Failing to remove excreta from wood slat floors in outside cages, remove trash accumulations, treat wood in outside cages in order to permit adequate cleaning and sanitation, and adequately clean and sanitize indoor wood cages as required by 9 CFR § 3.7.

Respondents are jointly and severally assessed a civil penalty of $250.00 which shall be paid by a certified check or money order payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served upon the parties.

In re: RICK STEPHENS, AWA Docket No. 382. Decided June 3, 1986.

Dealer—engaged in business without a license—Civil Penalty--Consent.

Howard Haas, Mktg. Div., for complainant.
Robert Evenson, Pineville, MO, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent willfully violated provisions of the Act and of the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

Respondent Rick Stephens is an individual whose address is Route 1, Rocky Comfort, Missouri. Respondent, at all times material herein, was a dealer within the meaning of the Act. Respondent, at all times material herein, was not licensed.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, his agents and employees, shall cease and desist from violating the provisions of the Animal Welfare Act and the regulations and standards issued thereunder.

Respondent is prohibited for a period of five (5) years from engaging in business in any capacity for which a license is required under the Act. Respondent may apply for a license five years from the effective date of this decision.

Respondent is assessed a civil penalty of $1,000.00 of which $300.00 shall be paid by certified check or money order made payable to the Treasurer of the United States. The remaining $700.00 is hereby suspended and shall be held in abeyance, provided the respondent does not violate any of the provisions of this order within five (5) years from the date this order become effective.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: CITY OF NEW BEDFORD, MASSACHUSETTS, AWA Docket No. 386. Decided June 6, 1986.

Exhibitor—improper housing facilities—Civil Penalty—Consent.

Bradley Flynn, Mktg. Div., for complainant.
Rosalind Poll Brooker, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent violated the regulations and standards issued pursuant to the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. The City of New Bedford is a municipality in the State of Massachusetts.

2. The respondent, at all times material herein, was owner and operator of Buttonwood Park Zoo, Post Office Box C-804, New Bedford, Massachusetts 02740.

3. The respondent, at all times material herein, was a licensed exhibitor under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, its agents and employees, directly or indirectly through any corporation, trust, or device whatsoever, shall cease and desist from:

1. Failing to house animals in enclosures that are structurally sound and constructed of material of such strength as appropriate for the animal involved;

2. Failing to otherwise maintain its facilities in compliance with section 3.125 of the standards (9. CFR § 3.125 (1986));

3. Failing to maintain any enclosure for marine mammals in a structurally sound condition;

4. Failing to otherwise maintain its marine mammal facilities in compliance with section 3.101 of the standards (9. CFR § 3.101 (1986)).

Respondent is hereby assessed a civil penalty of $1,000. Payment of such penalty is suspended, provided that, within one year of the date this order is entered, respondent spends in addition to the funds already allocated to Buttonwood Park Zoo, $1,000 on the maintenance and upgrading of animal enclosures at Buttonwood Park Zoo. As evidence that such condition is performed, within one year of the date of this order entered, respondent will prepare a report detailing both appropriated and actual expenditures devoted to the maintenance and upgrade of such animal enclosures. Respondent will send this report to the Animal and Plant Health Inspection Service, 424 Trapelo Road, Building 133, Waltham, Massachusetts 02154.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: HENRY HAMPTON, d/b/a HAMPTON ENTERPRISE, AWA Docket No. 372. Decided June 18, 1986.

Dealer—Civil Penalty—Suspension—Consent.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131–2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1–3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations contained in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

A. Henry Hampton is an individual doing business as Hampton Enterprise and his address is Route 1, Box 208A, Mount Ulla, North Carolina 28125.

B. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (No. 55–B–69) issued pursuant to the Act.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Henry Hampton shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131–2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1–3.142, and shall cease and desist from any

Respondent is assessed a civil penalty of $1,000 to be paid by certified check or money order and made payable to the Treasurer of the United States.

Respondent's license is hereby suspended for fourteen (14) days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: DONALD D. FOSTER, d/b/a WHITE GATE KENNELS, AWA Docket No. 375. Decided June 18, 1986.

Dealer—Civil Penalty—Suspension—Consent.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Donald D. Foster is an individual doing business as White Gate Kennels and his mailing address is Route 3, Box 201A, Macon, Missouri 63552.

2. The respondent, at all times material herein, operated as a dealer within the meaning of the Act and held a Class B license (No. 43-HS) issued pursuant to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Donald D. Foster shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142, and shall cease and desist from any violation thereof.

Respondent is hereby assessed a civil penalty of $5,000. Of this amount, $3,000 is to be paid by certified check or money order made payable to the Treasurer of the United States. The remaining $2,000 is suspended provided the respondent complies with the Act and the regulations and standards issued thereunder. If, after notice and hearing, the respondent is found to have violated the Act or the regulations and standards issued thereunder, this $2,000 shall become due and payable by certified check or money order made payable to the Treasurer of the United States.

Respondent's license is suspended for thirty (30) days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service (APHIS) that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in full compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: JONI BOOTH, AWA Docket No. 289. Decided May 29, 1986.

Robert Frisby, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

ORDER TO DISMISS

Complainant has moved to dismiss this case.

In support of complainant's motion, complainant has stated that the respondent has surrendered her dealer's license (No. 43 LLT) and no longer operates as a dealer under the Animal Welfare Act.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is ordered that this complaint be dismissed.

In re: GARY QUAS, d/b/a BAMBI PARK, AWA Docket No. 379. Decided June 25, 1986.

Howard Haas, Mktg. Div., for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

ORDER TO DISMISS

Complainant has moved to dismiss this case.

In support of this motion, complainant has stated that respondent is no longer operating the business which gave rise to the charges in this case and has surrendered his license. Under these circumstances the complainant believes that further formal proceedings are unnecessary to achieve the purposes of the Act.

WHEREFORE: FOR GOOD CAUSE SHOWN, it is hereby ordered that this complaint be dismissed without prejudice.

In re: GREEN LAKE MEATS, INC., FMIA Docket No. 89. Decided June 30, 1986.

Harold Reuben, Reg. Div., for complainant.
James L. Quarles, III, Washington, DC, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown in complainant's Motion for Dismissal of Complaint, the complaint that was filed herein against Green Lake Meats, Inc., on May 14, 1985, is herewith dismissed.

DISCIPLINARY DECISIONS

In re: JEFFREY M. RILEY and JOE P. RILEY, P&S Docket No. 6553. Decided May 5, 1986.

Market agency—dealer—misrepresentation of weights—false documentation—faulty scale—Civil Penalty—Prohibited from engaging in business—Consent.

Jory Hochberg, for complainant.
Ernest Van Hooser, Kansas City, MO, for respondent.

Decision by Edward McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Order to Show Cause filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Order to Show Cause and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jeffrey M. Riley and Joe P. Riley, hereinafter referred to as the respondents, are partners doing business as Lexington Sales Company. Respondents' principal place of business is located at Lexington, Tennessee, and their business mailing address is P. O. Box 393, Lexington, Tennessee 38351.

2. The respondents, at all times material herein, were:

(a) Engaged in the business of conducting and operating the Lexington Sales Company stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock on a commission basis at the stockyard;

(c) Engaged in the business of a dealer buying and selling livestock in commerce for their own account; and

(d) Dealers and market agencies within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

(e) Not registered with the Secretary of Agriculture in any capacity subject to the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Jeffrey M. Riley and Joe P. Riley, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Weighing livestock at other than true and correct weights;

2. Preparing or issuing scale tickets, buyers' invoices, accounts of purchase, or any other documents evidencing the purchase or sale of livestock, which show false or incorrect weights for such livestock;

3. Paying the owners or sellers of livestock on the basis of false or incorrect weights; and

4. Failing to maintain and operate their livestock scale in strict conformity with the requirements of section 201.73-1 (INSTRUCTIONS FOR WEIGHING LIVESTOCK) of the regulations (9 CFR § 201.73-1).

Respondent Jeffrey M. Riley is prohibited from engaging in business and operating subject to the Act as a dealer, market agency or stockyard owner for a period of 90 days, and during such time may not register with the Secretary of Agriculture as a market agency or a dealer under the Act.

Respondent Joe P. Riley is prohibited from engaging in business and operating subject to the Act as a dealer, market agency or stockyard owner for a period of 60 days and during such time may not register with the Secretary of Agriculture as a market agency or a dealer under the Act.

Respondents are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

The provisions of this order shall become effective May 1, 1986.

Copies of this decision shall be served on the parties.

In re: LAWRENCE KOEBKE, P&S Docket No. 6603. Decided March 27, 1986.

Dealer—engaging in business without proper bonding—failure to pay full purchase price—Default.

Thomas Heinz, P&S DIV., OGC, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Lawrence Koebke, hereinafter referred to as the respondent, is an individual whose business mailing address is R.R. 1, Traer, Iowa 50675.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified by certified mail on March 13, 1985, that the $60,000.00 surety bond maintained to secure the perform-

ance of his livestock obligations under the Act was being terminated on June 4, 1985. Respondent was further notified on April 22, 1985, that it was necessary for him to file an increased bond in the amount of $65,000.00 and that if he continued his livestock operations under the Act without adequate bond or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for his own account without having and maintaining an adequate bond or its equivalent as required by the Act and the regulations.

3. (a) The respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, in connection with his operations as a dealer subject to the Act, purchased livestock in commerce and failed to pay, when due, the full purchase price of such livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent Koebke, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations; and

2. Failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of twenty-eight (28) days and thereafter until he complies with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty-eight (28) day period.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 *et seq.*).

[Decision and Order became final on May 5, 1986.—Ed.]

In re: RANCHERS AND FARMERS LIVESTOCK AUCTION, INC., and L. KIRBY POWELL, P&S Docket No. 6692. Decided May 5, 1986.

Market agency—dealer—insolvency—custodial account—misuse of funds—suspension—prohibited from operating as dealer or market agency—Consent.

Jory Hochberg, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the corporate respondent named herein does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jursidictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ranchers and Farmers Livestock Auction, Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located at Burlington, Colorado. Its business mailing address is Box 635, Burlington, Colorado 80807.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Ranchers and Farmers Livestock Auction, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis, and as a dealer to buy and sell livestock for its own account.

3. L. Kirby Powell, hereinafter referred to as respondent Powell, is an individual whose business mailing address is Box 635, Burlington, Colorado 80807.

4. Respondent Powell is, and at all times material herein was:

(a) President, manager and a substantial stockholder of the corporate respondent;

(b) Responsible for the direction, management and control of the corporate respondent;

(c) Engaged in the business of conducting and operating the stockyard;

(d) Engaged in the business of selling livestock on a commission basis at the stockyard and buying and selling livestock in commerce for his own account; and

(e) A market agency and a dealer, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, and employees, successors and assigns, and respondent Powell, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Operating as a dealer or market agency while their current liabilities exceed its current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 of the regulations (9 CFR § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

4. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock; and

5. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

Respondent Ranchers and Farmers Livestock Auction, Inc., is suspended as a registrant under the Act for a period of twenty one (21) days and thereafter until it demonstrates that its current liabilities do not exceed its current assets. When respondent demonstrates that its current liabilities do not exceed its current assets, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the twenty one (21) day period of suspension. Respondents have demonstrated that the deficit in their custodial account has now been eliminated.

Respondent Powell is prohibited from operating as a dealer or a market agency subject to the Act, or from being employed by a dealer or market agency subject to the Act, for a period of 21 days.

The provisions of this order shall become effective May 4, 1986.

Copies of this decision shall be served upon the parties.

In re: CORN STATE MEAT COMPANY, INC.; TERRANCE P. (TERRY) PRINCE, JR.; and JAMES L. WIGGS. P&S Docket No. 6427. Decided May 8, 1986.

Packer—Commercial bribery—Civil penalty.

The Judicial Officer reversed Judge McGrail's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The ALJ's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1979 to 1981, primarily by splitting their profits on resale with three employees of two firms from which respondents bought meat products. Responsible hearsay is admissible in USDA proceedings. Where there are closely held corporations, the disciplinary order can be made applicable to the officers and stockholders who operated the corporation. Commercial bribery violates the P&S Act. Complainant need only prevail by a preponderance of the evidence. The failure of the individual respondents to testify gives rise to the inference that their testimony would have been adverse to their position.

Proof of injury or likelihood of injury is not required in commercial bribery cases. Severe sanction policy explained. The *Bosma* decision, requiring the Department to produce evidence that the penalty will not affect the person's ability to continue to do business, is erroneous, but, in any event, that issue is irrelevant here since respondent corporation is already out of business. In addition, commercial bribery is so inimical to the meat packing industry that a civil penalty for commercial bribery adversely affecting the person's ability to continue in business would be in the public interest.

Thomas C. Heinz, for complainant.
Timothy W. Shuminsky, Sioux City, Iowa, for respondents Corn State and Terrance P. (Terry) Prince, Jr.
Gary E. Wenell, Sioux City, Iowa, for respondent James L. Wiggs.
Edward H. McGrail, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on February 10, 1986, by Administrative Law Judge Edward H. McGrail (ALJ) in which he found that respondents engaged in "commercial bribery" from 1979 to 1981, primarily by splitting their profits on resale with three employees of two firms from which respondents bought meat products. The ALJ ordered respondents to cease and desist from such activities, and respondents were assessed, jointly and severally, a $25,000 civil penalty.

On March 13, 1986, complainant, seeking a $50,000 civil penalty, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On April 4, 1986, respondent Wiggs filed a response in the nature of a cross-appeal, asking that the complaint be dismissed or the penalty suspended. On April 24, 1986, the case was referred to the Judicial Officer for decision.

* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

Based upon a careful consideration of the record, the ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize, except that the civil penalty is increased to $50,000, and the last two sentences of the discussion of page 28 headed "Sanction" (relating to the $25,000 civil penalty) are deleted. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter the "Act", instituted by a complaint and notice of hearing filed on October 10, 1984, by the Packers and Stockyards Administration hereinafter "the complainant". The complaint alleged that the corporate respondent, under the direction, management and control of the individual respondents, made payments to three employees of two meat packing companies for the purpose of inducing and influencing these employees to negotiate purchase and sale contracts favoring the corporate respondent, such payments being made without the knowledge or consent of the companies by whom they were employed. By reason of these facts, the respondents were alleged to have violated sections 202(a) and 202(b) of the Act (7 U.S.C. §§ 192(a), 192(b)).

Respondents filed an answer admitting that the individual respondents were owners, officers and managers of the corporate respondent, that the corporate respondent made some payments to the employees named in the complaint but denying that these payments were made for the purpose of inducing and influencing these employees to negotiate purchase and sale contracts favoring the corporate respondent, and further denying that the payments were made without the knowledge or consent of the employers. Respondents alleged they have not knowingly or intentionally violated the Act.

An oral hearing was held before the undersigned on July 16 and 17, 1985, in Sioux City, Iowa. Respondent Corn State and respondent Terrance P. (Terry) Prince, Jr., were represented by Timothy W. Shuminsky, Esquire, Sioux City, Iowa, and respondent James L. Wiggs, was represented by Gary Wenell, Esquire, Sioux City, Iowa. Complainant was represented by Thomas C. Heinz, Esquire, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. Four witnesses were called to testify by Complainant. Complainant introduced eight exhibits into evidence. Respondents proffered no witnesses or documentary evidence. The parties were

granted leave to file simultaneous briefs on or before August 26, 1985. Such briefs have been filed and duly considered.

STATEMENT OF LAW

Sections 202(a) and 202(b) of the Packers and Stockyards Act (7 U.S.C. § 192(a), 192(b)) provide:

> It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

RESPONDENT COMPANY, AND RELATED COMPANIES

Prior to any discussion of the record, an understanding of the Respondent company, and related companies is necessary.

Corn State Meat Company, Inc. (Corn State)

At all times material herein was engaged in the business of marketing meats, meat food products, or livestock products in unmanufactured form acting as a wholesale broker, dealer or distributor, and hence was a packer within the meaning of the Act. Its place of business was located at 916 Grandview Boulevard, Sioux City, Iowa 51101. (Answer, paragraphs I., 1.(a) and 1.(b)(1)). It occupied approximately 1,000 feet of space at this location which included a lobby area where the bookkeeper was located, three offices and some closet space. Corn State is no longer engaged in business (Tr. 130).[1]

Respondent Prince was the president, vice-president, an owner, manager, director and controller of Corn State. Respondent Wiggs was secretary, treasurer, an owner, manager, director and controller of Corn State (Answer, paragraphs I., 2.(a)(b), I., 3.(a)(b)).

[1] Reference to exhibits are designated "CX" to indicate those submitted by complainant. No exhibits were offered by respondents. References to the hearing transcript are designated "Tr.".

P. & P. Trading Co., Inc. (P&P)

At all times material here was a brokerage house that brokered meat products between dealers and suppliers (Tr. 35). Respondents Wiggs and Prince were the owners and operators of P&P. As of January 30, 1979, it occupied the same office facilities as did Corn State, 916 Grandview Boulevard, Sioux City, Iowa, 51101 and had the same telephone number (CX 5, p. 5; Tr. 39–41, 130).

Country Products, Ltd. (Country Products)

At all times material here was a brokerage house that brokered meat products between dealers and suppliers. The articles of incorporation show that Respondents Wiggs and Prince, and Lee Schroeder were its directors and stockholders. Mr. Schroeder was its sole employee. It, too, occupied the same office facilities as did Corn State and P&P, 916 Grandview Boulevard, Sioux City, Iowa 51101, and had the same telephone number (CX–6, p. 19; Tr. 40–41, 130, 144, 160).

Farmland Foods, Inc. (Farmland) is a packer presently operating plants in Iowa and Nebraska. It is a cooperative owned by its member ranchers and farmers and maintains its headquarters in Kansas City, Missouri (Tr. 61).

Iowa Beef Processors, Inc. (IBP) is a packer with a multi-plant operation headquartered in Dakota City, Nebraska (Tr. 112–113).

DISCUSSION AND CONCLUSIONS

Mr. Merle Paulsen has been employed by the Marketing and Practices Branch, Packers and Stockyards Administration, U.S. Department of Agriculture (P&S) as a marketing specialist and as an auditor for approximately six years. Prior to that he was employed as an auditor by the State of Nebraska, and as an accountant in private industry. His present duties include investigation of trade practice violations under the Packers and Stockyards Act. In the course of his duties he examined the records of Corn State Meat Co., Inc. (Corn State) to determine if that company or any of its employees had committed any such trade practice violations (Tr. 15–16, 127)

His examination of the records of Corn State, which also included records of P&P and Country Products, disclosed checks, general ledger sheets and invoices which contained entries and notes regarding payments made by Corn State to the following individuals:

Robert (Bob) Ingram

Thirteen checks drawn on the account of Corn State between March 14, 1979 and March 6, 1981, were made payable to Robert or Bob Ingram, and endorsed by him. An additional check, number 807, dated October 9, 1979, was made payable to (sic) "R. H. B. for Bob Ingram," in the amount of $2,938.90. It was endorsed by Rufenacht, Bromagen and Hertz, West Point, NE (R.B.H.), a commodity broker, and deposited to its "Customer Segregated Funds Account." Three other checks dated February 12, 1980, April 17, 1980, May 12, 1980 and numbered 1038, 1148, and 1177, respectively, were made payable to the Northwestern National Bank. Two of the checks, numbers 1038 and 1177, were not endorsed while the third of these checks, number 1148, was endorsed by "Ellen Maximona." The majority of the seventeen checks were signed by Respondent Terry Prince and two were signed by Respondent James Wiggs. They totalled $43,012.15 (CX-1; Tr. 17-18, 39, 127-128, 131, 133, 151).

Copies of the general ledger sheets obtained from Corn State, Account No. 74, "Consultant Fees-Brokerage Fees," reflected Robert Ingram as recipient of not only the monies from the thirteen checks endorsed by him, but also of the monies represented by check No. 807 made payable to "R. H. B. for Bob Ingram" and the three checks, nos. 1038, 1148 and 1177, made payable to the Northwestern National Bank (CX-4, p. 1, line 27; p.2, lines 12, 17, 21; Tr. 19-20, 39, 41-43). Each of the checks tabulated by Mr. Paulsen on CX-1, have a corresponding entry on CX-4 by date, name and amount.

Mr. Paulsen testified that he had talked to the bookkeeper at Corn State, Ellen Maximona, who advised him that she cashed all three of the above checks made payable to Northwestern National Bank and turned the money over to Respondents Prince and Wiggs (Tr. 133-134).

Mr. Paulsen, he could not determine whether monies from four of these transactions were actually paid to Robert Ingram.[2] Additionally, the undersigned noted two other transactions amounting to $1,000.00 where it could not be determined whether monies were actually paid to Robert Ingram.[3] Eliminating these six transactions, the total amount of money designated for Robert Ingram by Corn State over this period of approximately one and a half years was $16,181.15 (CX-5, p. 1).

The tabulation for Robert Ingram, CX-5, p. 1, is an index to the transactions which follow on pp. 2-102. For example, CX-5, p. 1, line 1, lists Farmland invoice number 99100 showing a sale to Corn State amounting to $24,090.55. CX-5, p. 2, shows the actual invoice from Farmland, while CX-5, pp. 3-4, show the transaction being handled by P&P, and CX-5, p. 5, shows the final billing by Corn State. It is noted on CX-5, p. 4, that the amount of $500.00 is designated "to Ingram." Similarly, CX-5, p. 1, line 2, lists Farmland invoice number 28030, showing a sale to Corn State amounting to $6,800.00. CX-5, p. 6, shows the actual invoice, while CX-5 pp. 7-8, 10 shows the transaction being handled by P&P, and CX-5, p. 9 shows the eventual billing by Corn State. It is noted on CX-5, pp. 10-11, that $200.00 is designated for "Ingram." Other notations are also found on these invoices, e.g., "4633 Ingram-⅓ of net profit", and "⅓ to Ingram-$3,498.35" (CX-5, pp. 99-100); "Pd. Ing. 1 1d in May" (CX-5, p. 93). In following the above sequence, each line of the tabulation on CX-5 may be traced to the actual invoices and billing on pp. 2-102. Each transaction, with the exceptions of the six transactions, *supra*, contain notations of the various amounts paid to "Ingram" over this period.[4] It is also noted that the invoices of Corn State and P&P are signed alternately by Respondents Wiggs and Prince (CX-5, pp. 9, 41, 46, 48, 54, 55, 63, 68, 72, 81, 85, 89, 94).

Joseph (Joe) T. Sixta

Five checks drawn on the account of Corn State between August 29, 1980 and December 9, 1980, were made payable to, and endorsed by, Joe Sixta. However, one of these

[2] CX-5, p. 1, lines 4, 6, 7, 8 (pp. 17-22; pp. 26-29; pp. 31, 33-36; pp. 32, 37-38).
[3] CX-5, p. 1, lines 16, 19 (pp. 66-69; pp. 79-83).
[4] CX-5, pp. 15, 23, 42, 48, 50, 54, 59, 64, 72, 77, 90, 96, 100.

checks, no. 1460, dated October 24, 1980, was endorsed by Joe Sixta "For Deposit of Lee Schroeder Only". A sixth check, number 1245, dated July 5, 1980, was made payable to, and endorsed by, Lee Schroeder. Three additional checks, numbers 1150, 1199, and 1227, dated April 2, 1980, May 27, 1980, and June 10, 1980 respectively, were made payable to the Northwestern National Bank and were also endorsed by Lee Schroeder. Six of the above nine checks were issued by Respondent Prince, and three were issued by Respondent Wiggs. The checks amounted to a total of $4,207.59 (CX-2).

As with Mr. Ingram, *supra*, Mr. Paulsen testified that each of these checks can be traced to Corn State's general ledger sheets, account number 74, *supra* (CX-4). Notations on the general ledger sheets show that although check numbers 1150, 1199 and 1227 were made payable to the Northwestern National Bank and endorsed by Lee Schroeder, the recipient of the monies from these three checks, $90.00, $100.00 and $100.00 respectively, was Joe Sixta (CX-4, p. 2, lines 18, 23, 24). The general ledger sheets also show that the monies from check number 1245 in the amount of $250.00, made payable to, and endorsed by, Lee Schroeder, and check number 1460 in the amount of $1,428.82, made payable to Joe Sixta and endorsed for deposit by Lee Schroeder, were paid to Joe Sixta (CX-4, p. 2, line 27, p. 3, line 21).

It is noted here that P&S Investigator Skram, *infra*, testified that Mr. Lee Schroeder advised him that he cashed the above checks made out to Northwestern National Bank (numbers 1150, 1199, 1227), and the one made payable to himself (number 1245), and gave the cash to Joe Sixta (Tr. 147-148).

Mr. Paulsen obtained copies of invoices from the records of Corn State which show five sales of products to Corn State by IBP, as well as two purchases from Corn State by IBP. The aggregate of monies designated for Joseph Sixta from the transactions amounts to $2,941.88 (CX-6, p. 1).

The tabulation for Joseph Sixta, CX-6, p. 1, is an index to each of the individual invoices found in CX-6, pp. 2-23. For example, CX-6, p. 1, line 1, lists IBP invoice number 44J04003A, showing a sale to Corn State in the amount of $7,998.00. CX-6, p. 2, shows the actual IBP invoice for this

transaction, while CX–6, p. 3, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $274.93 was designated for "Sixta". Similarly, CX–6, p. 1, line 2, lists IBP invoice number 40J21008B showing a sale to Corn State in the amount of $23,760.00. CX–6, p. 4 shows the actual IBP invoice for this transaction while CX–6, p. 5, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $272.25 was designated for "Sixta". Additionally, CX–6, p. 1, line 3, lists IBP invoice number 40J28009A which, after deduction of an overbilling, amounted to $23,940.00. CX–6, p. 6, shows the overbilling on actual invoices of IBP and Corn State, while CX–6, p. 7, shows the invoice for the resale of these products by Corn State. A notation on this Corn State invoice shows that $745.88 is designated for "Sixta". The total monies designated for "Sixta" on CX–6, pp. 3, 5, 7, amounts to $1,293.06. The two checks issued by Corn State to Joe Sixta, numbers 1350 and 1395 in the amounts of $200.00 and $1,093.06 (CX–6, pp. 8, 9), respectively, total the exact amount designated for "Sixta" on CX–6, pp. 3, 5, 7, $1,293.06. These checks are also tabulated on CX–2, p. 1 and copies included in CX–2, pp. 6, 7. They are also recorded on Corn State's general ledger sheet, account number 74 (CX–4, p. 3, lines 10, 14). It is noted here that Respondent Wiggs issued check number 1350, and Respondent Prince issued check number 1395. Both checks were endorsed by "Joe Sixta".

Finally, there are two other transactions to be noted which trace payments to Joe Sixta through invoices of IBP, Corn State and checks issued by Corn State. The tabulation, CX–6, p. 1, line 4, lists IBP invoice number 40K11012A showing a sale to Corn State in the amount of $23,940.00. CX–6, p. 10, shows the actual IBP invoice while CX–6, p. 11, shows the Corn State invoice for the resale of these products. A notation on this Corn State invoice shows that a payment of $1,428.82 was designated for "Sixta". CX–6, p. 12, is a copy of a Corn State check, number 1460, issued to Joe Sixta by Respondent Prince in the amount of $1,428.82. This check is endorsed by Joe Sixta "For Deposit of Lee Schroeder Only". This is a copy of the same check noted above, no. 1460, and can also be traced to Corn State's account number 74 (CX–2, p. 8; CX–4, p. 3, line 21).

The second of these transactions is a purchase of products by IBP from Corn State. CX-6, p. 1, line 7, lists IBP purchase order number P.O. 95928-S in the amount of $4,385.55. CX-6, p. 6, is a copy of this purchase order showing the IBP agent for the purchase as "Joseph T. Sixta". In this instance, the sale to IBP was initiated through Country Products, Ltd., by Lee Schroeder (CX-6, p. 22). A notation on the Country Products invoice designated "$90.00—Pd.—consultant fee". Check number 1150 in the amount of $90.00, *supra,* was issued by Respondent Prince on the account of Corn State and made payable to Northwestern Bank. As noted previously, it was endorsed and cashed by Lee Schroeder and the money turned over to Joe Sixta (CX-6, p. 23; CX-2, p. 1,2). This check is traceable to Corn State's account number 74, wherein the amount of the check dated April 21, 1980, is designated for "Sixta" (CX-4, p. 2, line 18).

Other notations also appear on Corn State and P&P invoices, e.g., Corn State invoice number 4810 contains the notation "figure Sixta" (CX-6, p. 14). P&P's invoice for the same transaction contains the notation "Sixta gets cut—do not [know] how much until profit figured" (CX-6, p. 16).

Donald (Don) D. Erickson

Three checks drawn on the account of Corn State between August 20, 1980 and October 10, 1980, were made payable to the Northwestern National Bank, numbers 1333, 1356 and 1442. The first check, number 1330, was endorsed by "Bobbie Maximona". The remaining two showed no endorsement. The total of the three checks amounted to $2,500.00 and were issued by Respondent Prince (CX-3).

Mr. Paulsen testified that these checks can also be traced to the general ledger sheets, account number 74, *supra* (CX-4). Although these checks were made out to the Northwestern National Bank, the general ledger sheets show that these monies, $1,000.00, $1,000.00 and $500.00, respectively, were paid to Donald Erickson (CX-4, p. 3, lines 7, 12, 18; Tr. 133-134). Mr. Paulsen further testified that Ellen "Bobbie" Maximona was the office manager and bookkeeper at the Corn State office location.

Mr. Joseph E. Skram has been employed by P&S, USDA, since 1978, first as a Marketing Specialist and for the last four years as a Packer and Poultry Specialist. Prior to 1979, he was a consultant to

several meat packers. He participated with Mr. Paulsen in the investigation of this matter. During the course of the investigation he interviewed Mr. Lee Schroeder who advised him he was an employee of Corn State, a director, an organizer and sole employee of Country Products, but that he had no association with P&P. During the course of the interview, Mr. Schroeder identified three Corn State checks made payable to Northwestern National Bank, and endorsed by him, numbers 1150, 1199, 1227, and one Corn State check made payable to, and endorsed by Lee Schroeder, number 1245, as being checks he cashed and later turned the monies from these checks over to Joe Sixta (CX-2, pp. 2-5; Tr. 143-148, 154-160).

Mr. Skram testified that he also interviewed Ms. "Bobbie" Maximona who he identified as the office manager and bookkeeper at the Corn State office location. Ms. Maximona identified Corn State checks made payable to Northwestern National Bank, numbers 1333, 1356 and 1442, as being checks she cashed and later turned the monies over to Respondents Wiggs and Prince. She explained that she probably endorsed check number 1333 because the bank employee did not recognize her as an employee of Corn State, and did not have to endorse the other two checks, numbers 1356 and 1442, because on those dates the teller did recognize her. She further advised Mr. Skram that the ultimate recipient of the monies from these three checks was Donald Erickson and that she noted his name in the general ledger sheet opposite the dates on which the checks were drawn (CX-3, pp. 2-3; CX-4, p. 3, lines 7, 12, 13; Tr. 149-151, 158-159).

During the course of his investigation Mr. Skram also contacted the office of RB&H at West Point, Nebraska, and determined that they had handled some transactions for Robert Ingram (Tr. 152).

Mr. Steven J. Bernard testified he has held the position of Director of Security, IBP, Inc., Dakota City, Nebraska (IBP) since August 2, 1983. In this position he has access to personnel files of all IBP employees. These files show that Joseph Sixta was employed by IBP as manager-in-charge of variety meats and was responsible for the merchandising of all commodities, except sausage, as well as customer relations. Mr. Bernard worked with Mr. Sixta for a short period of time before Mr. Sixta was terminated from IBP (Tr. 86-87, 94, 114).

Over the years, IBP has had a "Conflict of Interest" policy which was substantially the same as the present one, except that the current one is a little more in depth. The current policy was revised on November 11, 1982, and circulated on January 26, 1983. Personnel files of IBP show that Mr. Sixta had signed a copy of IBP's current

flict of interest policy statement on March 19, 1979, June 28, 1980, and April 2, 1982. This policy prohibits employees from engaging in any activities which could conflict with their duties to IBP, and specifically ". . . prohibits employees from accepting any gifts, loans or other favors from business contacts," as well as, ". . . any activity which might place an employee of IBP under any obligation, or might improperly influence his business judgment, to an outside firm or person who might reasonably expect at a future date to benefit by that obligation." Violation of such policy could result in appropriate disciplinary action, including discharge (CX-8; Tr. 114, 120-123).

Mr. Bernard, together with two other officials of IBP, the executive vice-president and a vice-president who was also legal counsel, were present on the afternoon of October 3, 1983, when Mr. Sixta was questioned by investigators of the Marketing Practices Branch, Packers and Stockyards Administration, United States Department of Agriculture (P&S), Messrs. Merle Paulsen and Joseph E. Skram, concerning alleged improprieties in Mr. Sixta's dealings with the Respondents. Mr. Paulsen presented certain checks to Mr. Sixta and requested an explanation as to why he had received them. As Mr. Bernard recalled, Mr. Sixta acknowledged his signature as the endorser on the checks but was vague in his recollection as to how he happened to receive the monies represented by the checks (Tr. 95-96, 98-99, 112).

Subsequent to this meeting with the P&S investigators, Mr. Sixta met alone with Mr. Bernard and the other two IBP officials. They advised Mr. Sixta that if such allegations were true IBP could not tolerate them since his actions violated IBP's conflict of interest policy. Mr. Sixta finally admitted that one of the checks for $1,000 was an impropriety on his part and did violate IBP's conflict of interest policy. He acknowledged he had endorsed another check for $600.00 which had been issued by Respondent Terry Prince. However, Mr. Sixta advised them that he did not believe the total amount of money Mr. Paulsen alleged he received, $4,882.00, was quite as much as he actually received. He could not recall whether he had received any cash from the Respondents. At the end of the interview with Mr. Bernard and the other IBP officials, Mr. Sixta was discharged because of his violations of the IBP conflict of interest policy, was taken to his office to clear out his belongings, and left the premises that afternoon. Although discharged, personnel records show that Mr. Sixta was allowed to resign effective October 1, 1983 (Tr. 99-100, 107-108).

Mr. Donald Erickson was described by Mr. Bernard as an Assistant Vice President of IBP in charge of boxed beef sales, and having

been employed by IBP since approximately 1972-1973. Following the interviews and the discharge of Mr. Sixta, there was a similar meeting with Mr. Erickson at which Mr. Bernard, the same two IBP officials, and P&S investigators, Messrs. Paulsen and Skram, were present. Mr. Paulsen presented documentation from Corn State records to Mr. Erickson showing three payments Mr. Erickson received from Respondent Terry Prince, two in the amount of $1,000 each, and one in the amount of $500. Mr. Erickson stated that one of the payments for $1,000 was a loan from Respondent Prince. However, he acknowledged that as of the date of the interview, approximately 3 years later, he had not repaid the amount of the loan. As Mr. Bernard recalled, Mr. Erickson showed no further cooperation with the P&S investigators (Tr. 87, 100, 119).

When the two P&S investigators left the room, Mr. Erickson advised Mr. Bernard and the other two IBP officials that he wished to leave the employment of IBP immediately. When pressed for the circumstances surrounding the receipt of payments from Respondents, Mr. Erickson stated that the payments were considerations made to him and he realized he had violated the IBP conflict of interest policy. At this point he advised Mr. Bernard and the other two IBP officials that it would be to his best interest not to discuss the allegations further. Mr. Erickson was discharged from IBP at that meeting; however, his personnel file reflects he was permitted to resign effective October 4, 1983. This file also reflected he signed IBP's conflict of interest policy statement on November 21, 1977, June 28, 1980, and February 3, 1983. The above facts to which Mr. Bernard testified are recorded in a memorandum he drew up on October 10, 1983 (Tr. 87, 100-101, 104, 108, 113, 122-123).

Mr. David L. Poole is the Director of Personnel, Farmland Foods, Inc., Kansas City, Missouri (Farmland), which is engaged in the production and sale of meat products. Mr. Robert Ingram was employed from July 24, 1978 until June 27, 1980, as the sales manager of Farmland's beef products plant at Garden City, Kansas. Mr. Ingram was terminated when the plant closed due to its nonprofitability. Mr. Poole testified that during the period of employment of Mr. Ingram, Farmland always had a conflict of interest policy pertaining to its employees. This policy was set forth in an Employee's Handbook, was updated annually and each time was brought to the attention of its employees. Essentially the policy forbade an employee from engaging in any business which is in competition with the company, and the acceptance of any gifts from any party engaged in dealings of any kind with Farmland, except those of limited value. Until the Packers and Stockyards investigators advised him of the investigation concerning Mr. Ingram, neither he

nor the President of the company were aware of Mr. Ingram receiving any monies from outside sources in regard to his position as sales manager. Nor was he aware of any other executives of the company who were. Had it been known, it would certainly have been cause for terminating his employment with Farmland (CX-9; Tr. 47-57, 65-67, 78).

Mr. W. Wayne MacDonald has held the position of Marketing Specialist, Meat Merchandising Branch, P&S, USDA, for the past seven years and prior to that held the position of Meat Grader with the USDA for approximately nine years. He was present during all of the testimony given at the hearing in this matter. Based on the record, he testified the P&S, USDA, considers the violations charged in this matter as serious since they have an anti-competitive effect on the industry and undermine the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats.

Because of this unwholesome effect, P&S, USDA, seeks a cease and desist order, as well as a civil penalty of fifty thousand dollars ($50,000) to be assessed jointly and severally against the respondents. P&S, USDA, believes the monetary penalty to be appropriate and necessary as it will be an effective deterrent in precluding such activities in the future, not only to the respondents involved here, but also those in similar positions in the meat industry. In reaching this conclusion Mr. MacDonald acknowledges he had not talked with anyone in the industry regarding respondents' activities, but that it was based on the record in this matter and on his long experience in the meat industry. Nor did he contact other like firms in the industry to determine whether they had been affected by the activities of the respondents (Tr. 186-17

also 1 Davidson, *Agricultural Law*, § 3.22 and cases cited therein at fn. 113. The object in an administrative hearing is to obtain all of the relevant facts free from any of the restrictive rules applicable to judicial proceedings. Moreover, responsible hearsay is admissible in USDA administrative proceedings. *In re American Fruit Purveyors, Inc.*, 30 A.D. 1542, 1574 (1971).

A second preliminary matter which must be addressed here is the argument by counsel for Corn State and respondent Prince that respondents Prince and Wiggs are not "packers" as defined by Section 191 of the Act (7 U.S.C. § 191), since from the record it "appears" that they are only employees of Corn State. Accepted by these respondents is the definition of "packer" found in *Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025 (E.D. Pa. 1978), i.e., the company must be closely held ". . . and all officers, jobs, decisions and actions taken are by the same person or persons, . . ." (Shuminsky Brief, pp. 4-5). It is noted here that: 1) respondent's answer admits respondent Prince was the president, vice president, stockholder and manager of Corn State, and that respondent Wiggs was the secretary, treasurer, stockholder and manager of Corn State (Ans. Para I 2(b), 3(b)); 2) respondent Wiggs' Brief acknowledges Terry Prince and James L. Wiggs are Corn State's two owners (Wenell Brief, p. 1) and; 3) unrefuted testimony of record shows respondents Prince and Wiggs as officers and owners (Wiggs-25%, Prince-75%), controlling the operations of Corn State (Tr. 40, 182; see also fn. 4, *supra*). Thus, this argument is totally without merit. It is noted here that Hendrick also stands for the proposition that the corporate device cannot immunize individual defendants from liability once it is found that they are "persons" and "packers" under the P&S Act. *Ibid.* at 1031.

There is no doubt from the record established here that respondents Prince and Wiggs not only owned and controlled Corn State but also P&P, and that they, together with Lee Schroeder, were organizers of Country Products. Further, that meat products were purchased in commerce from Farmland and IBP, as well as sold to IBP. There is also no doubt that Messrs. Ingram, Sixta and Erickson were not brokers or consultants, nor did they perform any legitimate services for Corn State for which they would be entitled to a commission or brokerage fee from Corn State, and certainly not a share of the profit on the resale by Corn State of meat products purchased from Farmland and IBP. It is clear from the records obtained from Corn State that payments were made to Messrs. Ingram, Sixta and Erickson by the respondents, such payments being made in the form of checks and cash to Messrs. Ingram and Sixta, and cash to Mr. Erickson—the cash originating in the form

of checks issued to Northwestern National Bank and endorsed and cashed by Lee Schroeder or Ms. Maximona, employees of Corn State. All checks were drawn on the account of Corn State and signed alternately by respondents Prince and Wiggs. The checks made out to Northwestern National Bank can be traced to Corn State's account no. 74, "Consultant Fees—Brokerage Fees". This is corroborated by statements made to P&S investigators that these checks were cashed and the money turned over to Joe Sixta (Lee Schroeder); that money from the checks was turned over to respondents Prince and Wiggs and notations were made in the general ledger sheets, account no. 74, that the cash was eventually given to Donald Erickson (Ms. Maximona).

The record further shows that the purchases from Farmland and IBP were hand recorded first on P&P invoices but eventually billed to the ultimate customer on Corn State typed invoices, and that both sets of invoices, together with several from Country Products, were entirely obtained from the records of Corn State. Notations on the handwritten invoice copies of P&P show a pattern of payments made on the basis of a percentage of profits made by Corn State on the resale of meat products purchased from Farmland and IBP (Ingram, Sixta), or a rounded dollar amount still based on the amount of profit on each transaction with either Farmland or IBP. In the case of Robert Ingram, the record shows that he was terminated from Farmland when the plant in which he was employed was closed due to its unprofitable operation. It may well be that Mr. Ingram's activities in his dealings with Corn State may have contributed to the demise of this plant. Mr. Ingram was not interviewed by P&S investigators to determine the reason for payments to him by Corn State. However, when the evidence of payments was presented to officials of Farmland, it was their judgment that had these payments been known to Farmland, Robert Ingram would have been discharged from that company because of violation of its conflict of interest policy. As noted previously, the checks and cash which can be connected with checks issued by Corn State and paid to Robert Ingram, amounted to $43,012.15. However, while Corn State's account no. 74 records the check payments to Robert Ingram, it does not record the amounts designated for Robert Ingram found on the invoices obtained from Corn State (CX-5). Thus, considering the $16,181.15 designated for Robert Ingram on these invoices together with the above total from checks and cash, respondents Prince and Wiggs, through Corn State, paid Robert Ingram a total of $59,193.30 over the period January 31, 1979—March 6, 1981 to suborn his fiduciary obligations to Farmland.

With regard to Joseph Sixta, the record has established that the checks and cash payments which can be traced to him through Corn State's account no. 74 amounted to $4,207.59. However, in Mr. Sixta's case, the amounts of three of the checks, nos. 1350, 1395, ($200 + $1,093.06 = $1,293.06) and no. 1460 ($1,428.82) are duplications of the amounts designated for "Sixta" on invoices obtained from Corn State's records (CX-6, p. 1) and recorded in Corn State's account no. 74 (CX-4, p. 3, lines 10, 14, 21). Thus, when the amounts of these checks are deducted from the invoice amounts designated for Joseph Sixta, and the $220 difference is added to the total amount of the checks, the overall amount paid by respondents Prince and Wiggs, through Corn State, to suborn Joseph Sixta's fiduciary obligations to IBP during the period April 21, 1980—December 9, 1980, is $4,427.59. As noted from the interviews with Joseph Sixta, he acknowledged endorsing the checks from Corn State when they were presented to him and admitted that at least one of them was an impropriety that did violate IBP's conflict of interest policy. He also acknowledged other payments from Corn State by stating he did not believe he had received as much as the $4,882.00 alleged to have been received by him. Because he had violated IBP's conflict of interest policy he was discharged by that company but officially allowed to resign from IBP.

Finally, with regard to Donald Erickson, the record shows that three payments, totalling $2,500.00, were made to him by Corn State during the period August 20, 1980–October 10, 1980. Although checks for this amount were made out to Northwestern National Bank, interviews by P&S investigators determined that the cash proceeds from these checks were turned over to respondents Prince and Wiggs, and that this cash was eventually turned over to Donald Erickson and recorded in Corn State's account no. 74. As noted from the interviews with Mr. Erickson, he stated that one payment of $1,000 was a loan from respondent Prince but he acknowledged he had not repaid this loan after an approximate three-year period. He also acknowledged that the payments made to him by Corn State were "considerations" which were violations of IBP's conflict of interest policy. As with Mr. Sixta, Mr. Erickson was also discharged on the spot, but officially allowed to resign from IBP.

What is not clearly demonstrated in this record is the purpose of the payments made by Corn State to the individuals employed by Farmland and IBP. It is clear, however, that the receipt of such payments was not known to the employers of the individuals and certainly Farmland and IBP received no benefit from these payments. Had it been known, they would have been discharged in the

case of Robert Ingram, and discharged sooner in the cases of Joseph Sixta and Donald Erickson. Therefore, it can be only concluded that these payments by respondents Prince and Wiggs were made *sub rosa* for an illegitimate purpose, i.e., influencing these individuals to provide favorable concessions in their dealing with Corn State's purchases. Corn State's inducing or bribing these individuals to obtain favorable concessions for Corn State disadvantages other purchasers competing with Corn State and undermines the sale structure of the sellers. Each of the individuals receiving payments from respondents Prince and Wiggs were in charge of sales for their respective products. Each were open to inducement by respondents to provide favorable terms or prices in their sales to Corn State. In some instances involving Messrs. Ingram and Sixta payments were made on the basis of a percentage of the profit Corn State earned on the resale of the meat products purchased from Farmland and IBP. This is corroborated in the record where it is shown that odd amounts of money, down to the last penny, were paid to Robert Ingram (CX-1, p. 1; CX-5, p. 1) and Joseph Sixta (CX-2, p. 1; CX-6, p. 1). Other round dollar amounts, $200, $500, $1,000, although not a specific percentage of profit earned by Corn State on its resales, appear to be a fixed pattern of fees still based on the amount of profit. For example, $500 was designated for Robert Ingram on profits of Corn State sales ranging from $2,288.85 to $8,160.42 (CX-5, p. 1), while amounts ranging from $90 to $250 were paid to Joesph Sixta (CX-2, p. 1; CX-6, p. 1). It is noted here that, although amounts paid to Donald Erickson can be traced to Corn State's account no. 74, "Consultant Fees-Brokerage Fees", there are no invoices of record to which these payments may be connected. However, they were acknowledged by Mr. Erickson as being "considerations" paid to him by Corn State. Such "considerations" caused him to request termination of his employment with IBP because of the further acknowledgement by Mr. Erickson that he had violated IBP's conflict of interest policy.

From the record as a whole it must be concluded that the payments by respondents Prince and Wiggs to the employees of Farmland and IBP can only be considered commercial bribery, i.e., payments made to employees or agents of buyers or seller, without benefit to their employer, and without the employer's knowledge and consent, in order to induce or hold patronage. *In re National Beef Packing Company*, 36 A.D. 1722, *aff'd* 605 F.2d 167 (10th Cir. 1979). Such activity has long been established as an unfair trade practice by the USDA under Section 202 of the Packers and Stockyards Act (7 U.S.C. § 192), as well as under Section 5 of the Federal Trade Commission Act (FTC Act) (15 U.S.C. § 45). Both Sections of

these Acts were enacted to prevent unfair trade practices in their incipiency because such practices as commercial bribery lack any redeeming value, evince bad business morals, and have a pernicious effect on competition. Anti-competitive practices properly deemed unfair under the FTC Act also reach Section 202 of the P&S Act. *National Beef, supra; In re Gol-Pak Corp.*, 27 A.D. 228, 234 (1968); *In re Hygrade Food Products Corporation*, 26 A.D. 825, 830–831 (1967); *Armour & Co.* v. *United States*, 402 F.2d 712, 722 (7th Cir. 1968); *Standard Distributors* v. *Federal Trade Commission* 211 F2d 7, 13 (1954); *Fashion Originator's Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 463, 466 (1941); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 693 (1948).

Further, unfair trade practices are not confined to those where competitive injury has already resulted, but include those where there is reasonable likelihood that the purpose will be achieved. *DeJong Packing Co.* v. *U.S.D.A.*, 618 F.2d 1329, 1337 (9th Cir. 1980), *cert. denied,* 449 U.S. 1061 (1980). See *Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Wilson & Co.* v. *Benson*, 286 F.2d 891, 895 (7th Cir. 1961); cf. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966). Since Section 202 of the P&S Act is designed to stop unfair trade practices in their incipiency before competitive injury has been suffered, and to reach special mischief and injury in the meat products industry, actual injury need not be shown. *National Beef, supra; Swift & Co., supra; Bruhn's Freezer Meats* v. *U.S.D.A.* 438 F.2d 1332, 1336 (8th Cir. 1971); *Central Coast Meats, Inc.* v. *U.S.D.A.*, 541 F.2d 1325 (9th Cir. 1976); *DeJong Packing, supra; Armour & Co., supra.* The likelihood of competitive injury is present here since the bribery injures the employer by depriving him of the maximum obtainable profits, *Grace* v. *E. J. Kozin*, 538 F.2d 170 (7th Cir. 1976).

Finally, in a recent decision involving Iowa livestock dealers the court stated: "A practice is 'unfair' under § 213(a) if it injures or is likely to injure competition." *Farrow* v. *USDA*, 760 F.2d 211, 214 (8th Cir. 1985). See, also, *In re World Wide Meats, Inc.*, 34 A.D. 71 (1975) (Consent); *In re Vernon Calhoun Packing Co., Inc.*, 34 A.D. 1364 (1975) (Consent).

As is usual in cases of alleged activities to restrain commerce, the Government is without the aid of direct testimony that the defendants entered into any agreement. It is compelled to rely on inferences drawn from their course of conduct as a whole. *Interstate Circuit* v. *United States*, 306 U.S. 208, 221, 59 S Ct., 467, 472 (1939); *National Beef, supra*, at 1735. The inference drawn from all of the evidence of record is that respondents made payments to employees of Farmland and IBP to suborn their fiduciary obligations to these

employers, and thus have violated Sections 202(a) and (b) of the Act.

The further inference that must be drawn is an adverse one to the respondents who were present during the entire oral hearing in this matter but did not take the stand to testify. It must be concluded that their silence raises the inference that had they testified their testimony would have been adverse to their position. See *In re James Grady*, et al. 45 A.D. ___ (January 31, 1986) (Slip Opinion, pp. 65-66); *In re Apex Meat Company*, 44 A.D. ___ (Sept. 5, 1985) (Slip Opinion, pp. 32-33); *In re Mattes Livestock Auction Market, Inc.* 42 A.D. 81, 101-102, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 A.D. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984).

SANCTION

Complainant here seeks a cease and desist order, as well as a civil penalty of fifty thousand dollars ($50,000) to be assessed jointly and severally. Severe sanctions for violations of the Department's regulations has been an established policy. *In re Braxton Worsley*, 33 A.D. 1547, 1556-1571 (1974); see also *In re Donald Hageman, S&H Hogs, Inc.*, et al., 42 A.D. 531, 546 (1983) and cases cited therein. Indeed, as Mr. MacDonald testified, the violations charged, and found, are serious because of their anti-competitive effect on the industry and the undermining of the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats. Mr. MacDonald, representing P&S views, believes that such a large monetary sanction is appropriate and necessary as an effective deterrent in precluding such activities in the industry in the future.

FINDINGS OF FACT

1. (a) Corn State Meat Company, Inc., hereinafter "Corn State," at all times material herein was an Iowa corporation with its principal place of business located at 916 Grandview Boulevard, Sioux City, Iowa 51101.

(b) Corn State at all times material herein was:

(1) Engaged in the business of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer or distributor in commerce; and

(2) A packer, within the meaning and subject to the provisions of the Act.

(c) Corn State is no longer engaged in business.

2. (a) Terrance P. (Terry) Prince, Jr., hereinafter referred to as respondent Prince, is an individual who resides at 134 Cook Drive, Sioux City, Iowa 51103.

(b) Respondent Prince at all times material herein was the president and vice-president and an owner, manager, director and controller of Corn State.

3. (a) James L. Wiggs, hereinafter referred to as respondent Wiggs, is an individual who resides at 2839 Summit Street, Sioux City, Iowa 51104.

(b) Respondent Wiggs at all times material herein was the secretary and treasurer and an owner, manager, director and controller of Corn State.

4. P&P Trading Co. was a brokerage house owned by respondents Prince and Wiggs and located in the same offices occupied by Corn State. Country Products, Ltd., also was a brokerage house which shared the same facilities and which was operated by respondents Prince and Wiggs and Lee Schroeder.

5. Farmland Foods, Inc., hereinafter "Farmland", is a packer headquartered in Kansas City, Missouri.

6. Iowa Beef Processors, Inc., hereinafter "IBP", is a packer headquartered in Dakota City, Nebraska.

7. Robert (Bob) Ingram, is an individual who during the period July 24, 1978, until July 27, 1980, was employed by Farmland as sales manager at Garden City, Kansas. Mr. Ingram was responsible for the sale and marketing of beef products produced by the Garden City plant. He personally handled a number of sales accounts.

8. Joseph L. (Joe) Sixta is an individual who was employed by IBP from prior to March 19, 1979 until October 3, 1984, when he was discharged because of violation of IBP's conflict of interest policy. Officially he was allowed to resign on October 4, 1984. He was the manager in charge of variety meats whose responsibilities included pricing, sales and customer relations.

9. Donald (Don) Erickson is an individual who was employed by IBP from approximately 1972-1973 until October 3, 1984, when he was discharged because of violation of IBP's conflict of interest policy. Officially, he was allowed to resign on October 4, 1984. At the time of his discharge he held the position of vice-president for boxed beef sales. He had certain customers he was responsible for on a daily basis.

10. During the period from at least 1979 up to the present, Farmland has had a policy regarding employee conflicts of interest. That policy states in part:

> No employee shall engage, directly, or indirectly, in any business which is in competition in any area or in any activity with his employer corporation, without the written consent of such employer . . .
>
> No employee shall accept any gift or gifts except those of limited value from any party engaged in dealings of any kind with his employer corporation.
>
> It shall be the duty of every employee to promptly notify his supervisor of any present or future holdings or transactions which may be in violation of the foregoing policy or policies (CX-9, Tr. 53).

This conflict of interest policy is communicated to new employees when first hired and is brought to the attention of employees annually.

11. During the period from March 19, 1979, up to the present, IBP has had a policy regarding employee conflicts of interest. The January 26, 1983, written version of that policy states in part:

> It is the policy of IBP not only to avoid any practice that might be detrimental to the corporation's interest, but also to avoid actions or practices that might be so construed. Any employee who believes that any practice in which he is engaged, or of which he is aware, may be so construed should immediately report it to his supervisor and to the Legal Division.
>
> This policy prohibits employees from accepting any gifts, loans, (other than from established lending institutions), or other favors from business contacts. It also prohibits the acceptance of entertainment (during or after business hours), business lunches and dinners, except when specifically believed beneficial to the Company and on the provision that they be reciprocated on the next appropriate occasion. It further prohibits any other activity which might place an employee of IBP under obligation, or might improperly influence his business judgment, to an outside firm or person who might reasonably expect at a future date to benefit by that obligation (CX-8, p. 4).

This conflict of interest policy was communicated periodically to all upper-level IBP employees, and specifically to Mr. Sixta and Mr. Erickson on various occasions between 1979 and 1983. Both men signed compliance statements acknowledging receipt.

12. During the period January 31, 1979, through March 6, 1981, a total of $59,193.30 in checks and cash was paid by respondents Prince and Wiggs to Robert Ingram. On three occasions, payments were first converted to cash by Ellen "Bobbie" Maximona, the Corn State bookkeeper, who then gave the cash to her employers, respondents Prince and Wiggs, and then made notations in Corn State's account number 74 that such cash payments were given to Robert Ingram.

13. During the period April 21, 1980, through December 9, 1980, a total of $4,427.59 in checks and cash was paid by respondents Prince and Wiggs to Joseph Sixta. On four occasions, the payments were channeled through Lee Schroeder, an employee of respondents. Mr. Sixta acknowledged receiving money from respondents.

14. During the period August 20, 1980, through October 10, 1980, respondents Prince and Wiggs made three payments totaling $2,500.00 to or for the benefit of Donald Erickson.

15. Respondents accounted for these payments to or for the benefit of Robert Ingram, Joseph Sixta and Donald Erickson in their account number 74, titled, "Consultant Fees, Brokerage Fees" (CX-4). There is no credible evidence Mr. Ingram, Mr. Sixta or Mr. Erickson rendered consulting, brokerage or any other legitimate services to respondents.

16. The payments made to Ingram were in fact a designated portion of the profits generated by the Corn State resale of products purchased by Corn State from Farmland. In some instances it appears Ingram got ⅓ of the profits. In other instances, the payments apparently were calculated as an arbitrary portion of the profits, usually $500.00 per load.

17. The payments made to Sixta were in fact a designated portion of the profits generated either by the Corn State resale of IBP products or by the Corn State sale of products to IBP. In most instances the payments apparently were calculated as an arbitrary portion of the profits.

18. Robert Ingram violated Farmland's conflict of interest policy by sharing the profits generated by the Corn State resale of meat products purchased from Farmland. If Mr. Ingram had provided paid consulting services to Corn State (and there is no evidence that he did), that also would have violated Farmland's conflict of interest policy. The executive management of Farmland was unaware Ingram was receiving money from Corn State. If management had been so aware, Ingram's receipt of money from Corn State would have been cause to terminate his employment.

19. Joseph Sixta violated IBP'S conflict of interest policy by sharing in the profits generated by the Corn State resale of meat prod-

ucts purchased from IBP and the Corn State sale of products to IBP. On October 3, 1984, when Mr. Sixta admitted to IBP management that he had violated his employer's conflict of interest policy, he was immediately fired.

20. On October 3, 1984, Donald Erickson admitted to IBP management that he had violated IBP's conflict of interest policy by receiving money from Corn State, a customer and a supplier of IBP, in return for unspecified "considerations". His employment was immediately terminated.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

I. The ALJ's Findings and Inferences Are Supported by the Record.

Respondent Wiggs, the only respondent who filed a response to complainant's appeal, argues that the evidence does not support the ALJ's findings of fact [5] because unreliable hearsay was admitted, and there is no evidence that the payments were made for the purposes of bribery. However, as the ALJ correctly noted (slip op. at 18-19), responsible hearsay is freely admitted in our Department's administrative proceedings, and the hearsay admitted here was of the sort upon which responsible persons are accustomed to rely. Furthermore, even without the hearsay evidence, the record contains adequate documentary evidence and admissions to support the ALJ's inference that the payments were made "*sub rosa* for an illegitimate purpose, i.e., influencing these individuals to provide favorable concessions in their dealing with Corn State's purchases" (slip op. at 24).

In addition, neither respondent Wiggs nor respondent Prince testified in this proceeding, notwithstanding the fact that both individual respondents were present during the entire hearing (Tr. 5, 191-92). Under the settled principle that has been followed in many proceedings before this Department,[6] and which has been

[5] Complainant need only prevail by a preponderance of the evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[6] *E.g.*, *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 Agric. Dec. ____ (Feb. 27, 1986); *In re Grady*, 45 Agric. Dec. ____ (Jan. 31, 1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. ____ (Oct. 17, 1985); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985) (decision on remand); *In re Petty*, 43 Agric. Dec. ____ (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits

Continued

followed in many judicial proceedings,[7] I infer that their testimony would have been adverse to their interests here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch* v. *Archer,* Cowp. 66, quoted with approval in Wigmore, *Evidence* § 285 (3d ed. 1940).

II. Proof of Injury or Likelihood of Injury Is Not Required in Commercial Bribery Cases.

Respondent Wiggs argues (Appeal Response at 10):

affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[7] 2 Wigmore, *Evidence* §§ 285-91 (3d ed. 1940); *United States* v. *Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-27 (1939); *Kirby* v. *Tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc.* v. *Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union* v. *NLRB*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 142, 148-49 (3d Cir. 1965); *Cromling* v. *Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles* v. *Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co.* v. *Ratcliff*, 108 F.2d 253, 256-57 (C.C. P.A. 1939); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

The complainant failed to produce the evidence required by *Central Coast Meats, Inc.* v. *U.S. Department of Agriculture*, 541 F.2d 1325 (1976-9th Cir.) and *Corona Livestock* v. *U.S. Department of Agriculture*, 607 F.2d 811 (1979-9th Cir.) to support the sanctions they have requested.

Presumably respondent Wiggs is arguing that the Department failed to prove that the commercial bribery involved here was likely to cause injury.

However, W. Wayne MacDonald, a marketing specialist in the Meat Merchandising Branch of the Packers and Stockyards Administration, with 25 years experience in the meat business (Tr. 173), testified as an expert witness that the commercial bribery involved here would have an anti-competitive effect on the industry and would undermine the trust that the two meat suppliers to respondents (Farmland and IBP) had in their employees (Tr. 166-88). Furthermore, as stated above, the record supports the ALJ's inference that the payments to the employees of IBP and Farmland were made for an illegitimate purpose to influence these individuals to provide favorable concessions in their dealing with respondents. Nonetheless, as shown below, in commercial bribery cases the Department does not have to prove injury or likelihood of injury.

Since the broad terms "unfair," "unjustly discriminatory," and "deceptive" used in §§ 202(a) and 312(a) of the Act are not defined, "their meaning must be determined by the facts of each case within the purposes of the Packers and Stockyards Act." [8] The terms are not so vague or uncertain, however, as to be an unconstitutional delegation of legislative authority.[9]

The Secretary "has broad powers under Section 202(a) with regard to trade practices which are 'unfair' in that they conflict with the basic policies of the various antitrust statutes, even though the practices may not actually violate those statutes." [10] "Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the

[8] *Capital Packing Co.* v. *United States*, 350 F.2d 67, 76 (10th Cir. 1965). Cases under § 202 of the Act are discussed in Annot. 5 A.L.R. Fed. 729 (1970).

[9] *Farmers Livestock Comm'n Co.* v. *United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (3-judge ct.); *O.V. Handy Bros. Co.* v. *Wallace*, 16 F. Supp. 662, 664-66 (E.D. Pa. 1936); and *see United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932).

[10] *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968); and *see DeJong Packing Co.* v. *USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits aff'd; suspension order rev'd); *cf. FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394, 396 (1953) (construing "unfair" method of competition under FTC Act).

Federal Trade Commission (15 U.S.C. § 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic." [11]

The use of adjectival qualifications such as "unjustly" and "undue" "enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b)." [12]

It has been held that in construing these terms, substantial weight must be given to whether the business activities were carried on "in good faith by normally fair methods not 'heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression.'" [13]

Specifically, it is well settled that commercial bribery is an unfair, unjustly discriminatory, and deceptive practice which is violative not only of § 202(a) of the Packers and Stockyards Act, but also the Robinson-Patman amendments to the Clayton Act (15 U.S.C. § 13(c)), and it is an unfair practice under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45).[14] As stated in *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1977), *aff'd*, 605 F.2d 1167, 1168-69 (10th Cir. 1979):

> Commercial bribery is the "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors." 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).
>
> The practice has been held violative of the Robinson-Patman amendments to the Clayton Act (15 U.S.C. § 13(c)), *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), and it has been recognized as an unfair trade practice under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45), where it is ap-

[11] *Armour & Co.* v. *United States*, 402 F.2d 712, 722 (7th Cir. 1968). *Accord*, *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits aff'd; suspension order rev'd).

[12] *Armour & Co.* v. *United States*, 402 F.2d 712, 717 (7th Cir. 1968).

[13] *Swift & Co.* v. *Wallace*, 105 F.2d 848, 856 (7th Cir. 1939).

[14] *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-36 (1977), *aff'd*, 605 F.2d 1167, 1168-69 (10th Cir. 1979); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 552-53 (1981); *In re Gol-Pak Corp.*, 27 Agric. Dec. 228, 232-35 (1968); *In re Hygrade Food Prods. Corp.*, 26 Agric. Dec. 825, 829-32 (1967).

plied to secret gifts or payments by sellers to employees or agents to induce them to promote purchases of the sellers' product by the employer of the agent or employee. *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939). Numerous administrative proceedings have been initiated against the practice by the Federal Trade Commission, resulting in orders prohibiting it. 2 CCH *Trade Regulation Reporter*, ¶ 7,903.

Likewise, the Packers and Stockyards Administration considers the practice an unfair and deceptive one. Consent and default cease and desist orders have been entered against commercial bribery and related practices. See, *e.g.*, *In re Dold Packing Co.*, 33 A.D. 775 (1974); *In re Robel Beef Packers, Inc.*, 31 A.D. 516 (1972); *In re Ed. Miniat, Inc.*, 28 A.D. 601 (1969); *In re Swift and Company*, 26 A.D. 638 (1967); *In re Hebron Packing Co., Inc.*, 25 A.D. 1006 (1966); *In re Marhoefer Packing Co.*, 25 A.D. 739 (1966); *In re South Chicago Packing Co.*, 20 A.D. 844 (1961). Decisions granting a cease and desist order have also been issued after administrative hearings in *In re Gol-Pak Corporation*, 27 A.D. 228 (1968), and in *In re Hygrade Food Products Corporation*, 26 A.D. 825 (1967).

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> '. . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. 'No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3rd ed. 1968).

The erosive effect was succinctly described by a Packers and Stockyards Administration witness:

> It seems to me that the person making the bribe has kind of the inside track on the business and can exclude competitors because of this relationship with the buyer . . . [P]rice and quality will frequently take a lesser place in making the buying decision when there is consideration of a bribe or gift of some sort. (Tr. 105).

Since commercial bribery is inherently unfair, unjustly discriminatory and deceptive, it is not necessary to show in a particular case that the commercial bribery involved caused injury or was likely to cause injury.

The Department has consistently taken the position that in order to prove that *any* practice is "unfair" under §§ 202(a) (7 U.S.C. § 192(a)) or 312(a) (7 U.S.C. § 213(a)) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury.[15]

A contrary view has been expressed in only a few, atypical cases (four from the Ninth Circuit). In *Armour & Co.* v. *United States*, 402 F.2d 712, 717-23 (7th Cir. 1968), involving coupon rebates to ultimate consumers on bacon packages, the Seventh Circuit held that the evidence must show either predatory intent or that the coupon practice was likely to result in injury to competition to be in violation of § 202(a).

In *Central Coast Meats, Inc.* v. *USDA*, 541 F.2d 1325, 1327 (9th Cir. 1976) (2-1 decision), in which the Department contended that a packer engaged in an "unfair" practice by being a packer and a dealer, the Ninth Circuit questioned the Secretary's argument that "actual injury need not be shown and that § 202(a) may be used to uproot unfair practices in their incipiency." The court held that

[15] *E.g.*, *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final order*, 44 Agric. Dec. ____ (Oct. 24, 1985) (consent cease and desist order and $10,000 civil penalty); *In re Walti, Schilling & Co.*, 39 Agric. Dec. 119, 149-50 (1978); *In re Hines*, 35 Agric. Dec. 113, 123-24 (1976); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 161-76 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); and *see Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman* v. *USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *Wilson & Co.* v. *Benson*, 286 F.2d 891, 895 (7th Cir. 1961); *Hyatt* v. *United States*, 276 F.2d 308, 312 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *cf. FTC* v. *Texaco, Inc.*, 393 U.S. 223, 225-26 (1968); *FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1953); and *Corn Prods. Refining Co.* v. *FTC*, 324 U.S. 726, 738 (1945) (the last three cases involve incipiency doctrine under FTC Act).

"the Secretary must show that the conduct in question [packer-dealing] is likely to produce the sort of injury the Act is designed to prevent" (*id.*).

In *Corona Livestock Auction, Inc.* v. *USDA*, 607 F.2d 811, 814 (9th Cir. 1979), in which the Department contended that a unique method of conducting a livestock sale was "unfair" because livestock buyers present at the sale were not permitted to bid on livestock, but could only accept or reject a predetermined price set by the salesman, who rotated the opportunity to accept or reject the price among the potential buyers, the Ninth Circuit repeated that the *Central Coast* case requires the agency to establish that a particular practice is "likely to produce the sort of injury the Act is designed to prevent."

In *DeJong Packing Co.* v. *USDA*, 618 F.2d 1329, 1336-37 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980), in affirming the Department's position that a group boycott of a livestock auction market by meat packers was an "unfair" practice, the Ninth Circuit held that the agency must show a "reasonable likelihood" of an undue restraint of competition.[16]

The Department does not agree with the decisions in the *Central Coast, Corona,* and *Armour* cases,[17] and adheres to its consistent policy set forth above.

In *Bosma* v. *USDA*, 754 F.2d 804, 808 (9th Cir. 1984), the court quoted its *Central Coast Meats, Inc.* holding that the Department must show that the challenged conduct "is likely to produce the sort of injury the Act is designed to prevent." The court found that actual harm resulted when an auction operator purchased livestock from consignments for speculation. *Id.* 808-09. However, notwithstanding its holding that proof of a likelihood of injury was necessary as to that particular type of violation, the court also held in the same case that the failure of the auction operator to inform

[16] In *Swift & Co.* v. *United States*, 317 F.2d 53, 56 (7th Cir. 1963), the Judicial Officer had held that proof of injury to competition, as required by § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was unnecessary to establish a violation of § 202(a) of the Packers and Stockyard Act. The court, however, did not decide whether that conclusion is correct "since it found that the point is academic" (*id.*).

[17] *See In re ITT Continental Baking Co.*, 44 Agric. Dec. ___ (Mar. 18, 1985), *final order*, 44 Agric. Dec. ___ (Oct. 24, 1985) (consent cease and desist order and $10,000 civil penalty); *Western Iowa Farms Co.* v. *Sioux City Stock Yards*, 38 Agric. Dec. 1296, 1322 n.12 (1979), *aff'd*, 629 F.2d 502 (8th Cir. 1980) (2-1 decision); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1602 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 171-77 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision).

consignors that he was the actual purchaser of their livestock was "inherently unfair" because "the market agent had a fiduciary duty to his consignors," and that such failure "may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm" (754 F.2d at 809). Hence the Ninth Circuit recognized in *Bosma* that whether a specific showing of actual harm is necessary depends on the type of violation alleged.

Finally, in *Farrow* v. *USDA*, 760 F.2d 211, 215 (8th Cir. 1985), involving an agreement by two competitors not to compete for certain cows at an auction market, the court held that "actual injury" need not be proven because the "purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered." The court said that "the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation" (*id.* 215).

If the cases requiring proof of a likelihood of injury are to be followed (which we believe is unsound), they should only be followed in the same types of cases in which the holdings were made. Holdings in all cases should be confined and limited to the facts under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). That principle was applied in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626–27 (1935), with respect to the decision in *Myers* v. *United States*, 272 U.S. 52 (1926), in which it is said that the numerous expressions in the *Myers* case beyond the "narrow point actually decided" do not come within the rule of *stare decisis* (295 U.S. at 626). Again the principle was followed in *Osaka Shosen Kaisha Line* v. *United States*, 300 U.S. 98, 102–04 (1937), with respect to the prior decision in *Taylor* v. *United States*, 207 U.S. 120, 124–25 (1907).

Many types of practices have been held to be "unfair" under the Packers and Stockyards Act without any proof of predatory intent or likelihood of injury. For example, it is an "unfair" practice for a livestock market agency to engage in business without a bond irrespective of any likelihood of injury. *E.g.*, *In re Hoth*, 36 Agric. Dec. 1812, 1817–19 (1977). In *Hoth*, the livestock market agency contended that there was no need for him to have a bond since he bought livestock only for a large packing agency, which was bonded, and he operated only with the packer's funds and paid for all livestock with checks drawn on the packer. There was no real "likelihood"

of injury there, but the market agency's practice of operating without his own bond was, nonetheless, held to be an "unfair" practice.

If proof of a likelihood of injury were required in cases involving the failure of a respondent to have the required bond, all, or almost all, of the bonding violation cases would be dismissed. It would be virtually impossible to predict, in advance, that a particular respondent was *likely* to go broke owing money for livestock. We know from experience that a number of firms will go broke each year and that without the required bond, there will be injury to livestock sellers. But we do not have a crystal ball to enable us to make a finding of fact that the failure of a *particular respondent* to have a bond is *likely* to result in injury.

Similarly, careless or deliberate false weighing is an "unfair" practice under the Act irrespective of any proof of predatory intent or likelihood of injury.[18] Anyone who thinks that the likelihood of injury in a false weighing case is obvious is unaware of the intricacies of false weighing violations. For example, a livestock buying station might increase the price to compensate for the short weight, or regular buyers at a livestock auction market, who would know of the short weights, might increase their bids in consideration of the short weights. All false weighing is routinely held to be an "unfair" practice, without proof as to whether there is a likelihood of injury, and in many cases, it would have been difficult, if not impossible, to prove such a likelihood.

Similarly, with respect to custodial account violations, the Department has always taken the position that it is an unfair practice for a livestock auction market to fail to properly maintain a Custodial Account for Shippers' Proceeds irrespective of any likelihood of injury.[19] And in custodial account violation cases, the De-

[18] *In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Loretz*, 36 Agric. Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

[19] *In re Powell*, 41 Agric. Dec. 1354, 1361 (1982); *Hyatt and Ward* v. *United States*, 276 F.2d 308, 309-13 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932); *In re Roseth*, 39 Agric. Dec. 28, 36 (1980), *aff'd per curiam*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310-11, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 667, 673 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller*, 33 Agric. Dec. 53, 59-62, *aff'd per curiam*, 498 F.2d 1088 (5th Cir.

Continued

partment has never been required to prove a likelihood of injury.[20] For example, in *Daniels* v. *United States*, 242 F.2d 39, 40-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957), the court held:

> The improper handling and use of the shippers' proceeds is plainly contrary to the Act, 7 U.S.C.A. §§ 205, 208 and 213(a), and of the regulations (9 CFR § 201.40-201.42.) The argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. Federal Trade Commission *v.* Raladam Co., 316 U.S. 149, 152, 62 S.Ct. 966, 86 L.Ed. 1336; Fashion Originators' Guild of America *v.* Federal Trade Commission, 312 U.S. 457, 466, 668, 61 S.Ct. 703, 85 L.Ed. 949.

Similarly, in *Bowman* v. *USDA*, 363 F.2d 81, 85 (5th Cir. 1966), the court held:

> And the Act is designed to "* * * prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required." Daniels *v.* United States, 7 Cir., 1957, 242 F.2d 39, 42.

In fact, in most custodial account cases, the Department would be unable to prove a likelihood of injury. Although we know from experience that about 10 to 20 auction markets go broke each year, and that about 3 to 6 of them will not have a bond adequate to cover the total losses, we do not have a crystal ball that would enable us to make a finding of fact that the failure of a *particular respondent* to maintain his custodial account properly is *likely* to result in injury.

As stated in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law* 282 (1981) (footnotes omitted):

1974); *In re Bowman*, 23 Agric. Dec. 1065, 1068-71 (1964); *In re Bowman*, 23 Agric. Dec. 1074, 1086-87 (1964), *aff'd*, 363 F.2d 81, 85-86 (5th Cir. 1966).

[20] *In re Roseth*, 39 Agric. Dec. 28, 33, *aff'd*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Miller*, 33 Agric. Dec. 53, 62-63, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *Bowman* v. *USDA*, 363 F.2d 81, 84-86 (5th Cir. 1966); *Hyatt and Ward* v. *United States*, 276 F.2d 308, 310-13 (10th Cir. 1960); *Daniels* v. *United States*, 242 F.2d 39, 40-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932).

The fact that no one suffered from a particular custodial account shortage is no defense, since it is the duty of the Packers and Stockyards agency to prevent potential injury by stopping unlawful practices in their incipiency. However, if the likelihood of injury test as applied in some judicial decisions were applied to custodial account violations, most of the complaints filed alleging custodial account violations would be dismissed. Rarely would it be possible to prove that injury would likely result from a particular custodial account shortage. Usually there would be a reasonable expectation that the time lag between the writing and cashing of the checks would prevent a default. Frequently there would be a line of credit from the bank. Almost always there would be a bond that could be relied on to cover part of any losses.

The most that could be shown is that if all or many of the market agencies selling livestock generally had custodial account shortages, there would be a likelihood that some of them would result in injury. Accordingly, it is the department's position that where there is a custodial account shortage, there is no need to show injury or likelihood of injury in a particular case. No court has required proof of a likelihood of injury in custodial account violation cases.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g., In re Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974),[21] which is set forth as Appendix A to this decision.[22] The Department's sanction policy is also discussed at length in *In re Esposito,* 38 Agric. Dec. 613, 624-65 (1979).

The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 193(b)):

> (b) . . . The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

In view of the size of the business involved here, the many violations, and the fact that commercial bribery is such a serious offense that it would, if not checked, undermine the entire meat marketing system in the United States, a civil penalty greatly in excess of $50,000 would be warranted here. The ALJ, in determining that

[21] The Department's severe sanction policy did not originate with *Worsley,* but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner,* 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller,* 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam,* 498 F.2d 1088 (5th Cir. 1974).

[22] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier,* 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.,* 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd,* No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.,* 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler,* 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.,* 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.,* 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland,* 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.,* 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.,* 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam,* 558 F.2d 748 (5th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978); *In re Catanzaro,* 35 Agric. Dec. 26, 31-32 (1976), *aff'd,* No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.,* 34 Agric. Dec. 773, 796, 801 (1975), *aff'd,* 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.,* 34 Agric. Dec. 700, 750, 762 (1975), *aff'd,* 549 F.2d 830 (D.C. Cir.), *cert. denied,* 434 U.S. 920 (1977); *In re Southwest Produce, Inc.,* 34 Agric. Dec. 160, 171, 178, *aff'd per curiam,* 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons,* 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam,* 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.,* 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd,* 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.,* 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Miller,* 33 Agric. Dec. 53, 64-80, *aff'd per curiam,* 498 F.2d 1088, 1089 (5th Cir. 1974).

a $25,000 civil penalty should be assessed, stated (Initial Decision at 28):

> Indeed, as Mr. MacDonald testified, the violations charged, and found, are serious because of their anti-competitive effect on the industry and the undermining of the trust placed in employees buying and selling meat products, as well as consumer trust in the marketing of meats. Mr. MacDonald, representing P&S views, believes that such a large monetary sanction [$50,000] is appropriate and necessary as an effective deterrent in precluding such activities in the industry in the future. However, sanctions, as well as being a deterrent, must also be realistic. The monetary sanction sought here is not realistic. Therefore, I find that a monetary civil penalty of $25,000, to be assessed jointly and severally, is a more realistic sanction and at the same time will also accomplish the purpose of a sanction, i.e., act as a deterrent to preclude such activities in the industry for the future.

future similar cases, this case will not be regarded as a precedei limiting the amount of future sanctions.

It should be noted that this case and *In re Holiday Food Service Inc.*, 45 Agric. Dec. ____ (May 8, 1986), also decided this day, ai the first litigated cases involving commercial bribery committe after the Act was amended to authorize civil penalties. In *Holida Food Services*, a $50,000 civil penalty is also being assessed agains a defunct corporation and the individual who was its chief execu tive officer and 50% owner.

Respondent Wiggs suggests that the penalty is too severe sinc "[l]ittle people [like respondents] don't go around offering to cor rupt big people [like IBP and Farmland]" (Appeal Response at 6) Respondent Wiggs suggests that the impetus for the bribes mus have come from IBP and Farmland—not respondents. Althougl there is no evidence as to who initially suggested the unlawful pay ments, and the individual respondents did not testify, it would not be a mitigating circumstance if the IBP and Farmland officials sug gested the profit-sharing scheme. Commercial bribery is destructive of the meat marketing system in the United States irrespective of who originates the fraudulent scheme.

With respect to "the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 193(b)), the Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, *e.g.*, *In re Peterman*, 42 Agric. Dec. ____ (slip op. at 1c) (Dec. 12, 1983), *aff'd*, No. 84-1053 (10th Cir. Aug. 13, 1985) (respondent allegedly unable to pay $20,000 civil penalty should have introduced evidence to that effect at the hearing); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as Appendix B to this decision.[24] In any event, however, this case is distinguishable from *Bosma*.

[24] *In re Upton*, 44 Agric. Dec. ____ (slip op. at 32) (Oct. 2, 1985); In re Saylor, 44 Agric. Dec. ____ (slip op. at 524-26) (Sept. 20, 1985) (final decision on remand) (respondent should have introduced evidence showing that he could not pay a $10,000 civil penalty).

Respondent Corn State Meat Company, Inc., has been out of business for several years, and there is no indication that it will ever be operative again. Hence the civil penalty imposed in this case cannot have any effect on respondents' ability to continue in business.

The Act requires the Secretary to consider the "size of the business involved," i.e., the business involved in the particular proceeding, and the effect of the penalty on the "person's ability to continue in business," i.e., to continue in the business involved in the proceeding. The Act does not require the Secretary to consider whether the penalty will have an effect on some unrelated business venture not involved in the proceeding.

Since respondents will not continue the Corn State Meat Company, Inc., meat business irrespective of any civil penalty in this case, which is the only relevant business to be considered under the Act, it is irrelevant whether a civil penalty will have any effect on respondents' ability to continue some other business. (The record shows that respondent Prince has been a bartender for the last 2 years (Tr. 188), and contains no evidence as to respondent Wiggs' present employment.) Hence the criterion relating to the effect of the penalty on the person's ability to continue in business is not applicable here.

Finally, it should be noted that commercial bribery is so inimical to the meat packing industry that it would be in the best interests of the meat packing industry for any person found to have engaged in commercial bribery to discontinue his meat packing business. Accordingly, a civil penalty imposed for commercial bribery that prevented a person from continuing his meat packing business would be in the public interest. As stated in *In re Saylor,* 44 Agric. Dec. ___ (slip op. at 526) (Sept. 20, 1985) (decision on remand) (8-month suspension order and $10,000 civil penalty):

> The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act.

The civil penalty was properly issued jointly and severally ainst the respondent corporation and the individuals who own, ect and control the corporation. As stated in *In re Pastures, Inc.,* Agric. Dec. 395, 397 (1980):

Respondents [i.e., the president of the corporation and his wife, who was the sole owner and secretary-treasurer of the corporation] are in error in believing that an order cannot be issued against them as individuals unless they personally caused the corporation's insolvency by embezzlement or [mis]appropriation of funds. *Sebastopol Meat Co.* v. *Sec. of Agr.*, 440 F.2d 983, 983-986 (9th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S.D.A.*, 438 F.2d 1332, 1342-1343 (8th Cir. 1971); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. [171, 173] (Jan. 30, 1980); *In re Norwich Veal & Beef, Inc., 37 Agric. Dec. 1202, 1205 (1978); In re Mid-States Livestock, Inc.*, 36 Agric. Dec. 172, 192-196 (1977), *aff'd*, 570 F.2d 701 (8th Cir. 1978); and *see Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025, 1030-1031 (E.D. Pa. 1978); *Fillippo* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1015-1018 (E.D. Pa. 1978).

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Corn State Meat Company, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondents Terrance P. (Terry) Prince, Jr., and James L. Wiggs, individually or as owners, officers or directors of any packer subject to the Act, shall cease and desist from:

1. Directly or indirectly giving or offering to give, or permitting or causing to be given, money or anything of more than nominal value to, or for the benefit of, an officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence any such customer or prospective customer to purchase or promote the purchase of meat, meat food products or livestock products from or through respondents; and

2. Soliciting or accepting favored treatment for respondents, or for any customer or prospective customer of respondents, through the offer or the gift of money or anything of more than nominal value to or for the benefit of any officer, director, agent or employee of a supplier of meat, meat food products or livestock products to respondents or to any customer or prospective customer of respondents.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Corn State Meat Company, Inc., respondent Terrance P. (Terry) Prince, Jr., and respondent James L. Wiggs are hereby assessed, jointly and severally, a civil penalty of fifty thousand dollars ($50,000).

The cease and desist provisions of this order shall become effective as to each respondent on the day after service of this order on such respondent.

The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250, not later than the 90th day after service of this order on respondents.

APPENDIX A

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Ed.]

APPENDIX B

Petition for Rehearing filed in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984) (Note: This Petition for Rehearing is printed as an appendix to *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985))

[Excerpt omitted.—Ed.]

In re: HOLIDAY FOOD SERVICES, INC. and NAT ROCKER. P&S Docket No. 6488. Decided May 8, 1986.

Packer—Commercial bribery—Civil penalty.

The Judicial Officer reversed Chief Judge Campbell's civil penalty determination, and increased the civil penalty assessed jointly and severally against respondents from $25,000 to $50,000. The Administrative Law Judge's cease and desist order was affirmed, as were the findings that respondents engaged in commercial bribery from 1977 to 1982 by making payments to buyers for four firms in connection with meat, meat food products, poultry and poultry products sold by respondents to the firms. Commercial bribery violates §§ 202 (a) and (b) of the Act. The civil penalty may be applied against the corporation and the person who was its chief executive officer, a director, and a 50% shareholder of the corporation. Severe sanction policy was explained. The *Bosma* decision, requiring the Department to produce evidence as to the effect of the penalty on the person's ability to continue to do business, is erroneous. But *Bosma* is irrelevant because respondent corporation is out of business. Commercial bribery is so inimical to the meat packing industry that it would be in the public interest to impose a civil penalty that would adversely affect the person's ability to continue in business. Consent orders are given no weight in determining the sanction to be imposed in a litigated case. Any damage resulting from an agency's press release is not considered in determining the sanction to be imposed.

Thomas C. Heinz, for complainant.
Harry G. Melkonian, Los Angeles, California, for respondents.
John A. Campbell, Chief Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on February 14, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) in which he found that respondents engaged in "commercial bribery" from 1977 to 1982 by making payments to buyers for four firms in connection with meat, meat food products, poultry and poultry products sold by respondents to the firms. The ALJ ordered respondents to cease and desist from such activities, and respondents were assessed, jointly and severally, a $25,000 civil penalty.

On March 1, 1986, complainant, seeking a $50,000 civil penalty, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 24, 1986, respondents filed a cross-appeal. On April 9, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the ALJ's findings and conclusions are adopted as the final decision in this case, with changes too minor to itemize, except that the figure $25,000 is changed to $50,000 in the discussion as to the sanction. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et. seq.*), hereafter called the "Act", instituted by a complaint filed on February 11, 1985, by the Packers and Stockyards Administration. The complaint alleged that the corporate respondent, under the management, direction and control of the individual respondent, made kickback payments to four employees of meat buyers in Hawaii, thereby violating sections 202(a) and 202(b) of the Act (7 U.S.C. §§ 192(a), 192(b)). Respondents filed an answer denying that the corporate respondent is a packer within the meaning of and subject to the provisions of the Act, and denied that the company made any kickbacks or that Mr. Rocker managed, directed or controlled the corporation. Respondents alleged that payments to the four employees were for lawful purposes. Respondents also alleged various affirmative defenses.

An oral hearing was held October 22 and 23, 1985, in Los Angeles, California. Respondents were represented by Harry G. Melkonian and Patricia M. Wilson of Buchalter, Nemer, Fields, Chrystie & Younger, Los Angeles, California. Complainant was represented by Thomas C. Heinz, Office of General Counsel, United States Department of Agriculture, Washington, D.C. At the close of the hearing, the time was set for the filing of briefs.

FINDINGS OF FACT

1. Holiday Food Services, Inc., hereafter "respondent Holiday", at all times material herein was a California corporation which was formed in 1976 and continued to operate until mid-1983. To date, the corporation has not been dissolved. Respondent Holiday has engaged in the business of marketing meats, meat food products and poultry products, acting as a wholesale broker, dealer or distributor in commerce, and is a packer within the meaning of and subject to the Act (7 U.S.C. § 191(c)). (Transcript of hearing [Tr.] 317–318, 320)

2. The principal executive and principal business offices of respondent Holiday are at 405 Centinela Avenue, Inglewood, California, where they have been located since the formation of the corporation in 1976. With the exception of petty cash records and other minor records, all books and records of respondent Holiday were maintained at the Inglewood, California, offices. All of respondent Holiday's customers were located in the State of Hawaii.

3. Respondent Holiday shares the same offices, directors, and officers with Holiday Meat and Provision Corporation, which is wholly owned by respondent Nat Rocker.

4. Nat Rocker, hereafter "respondent Rocker", is an individual residing at 4991 Amigo, Tarzana, California 91356. At all times material herein, respondent Rocker was the chief executive officer, a director, and a 50% shareholder of respondent Holiday. Ron Vogel is the other owner but has had no responsibilities in the operation of respondent Holiday since 1980 or 1981. Before that time his only responsibility was to serve as accountant for the company.

I

5. During the period from January 1977, through May of 1983, respondent Holiday sold meat, meat food products, poultry and poultry products to Flagship International, Inc., which purchased the products under the trade name "Sky Chefs" in Hawaii.

6. During the period from January 1977, through May 1983, Sky Chefs employed Nick Rodrigues, Sr., in a capacity which included responsibility for purchasing food products on behalf of his employer. During the same period Sky Chefs purchased meat, meat food products, poultry and poultry products from respondent Holiday, respondents also made monthly payments by check to Nick Rodrigues, Sr., from February 1977, through June 1980, as found in complainant's exhibit (Cx) 2. (See also Tr. 110–111). This exhibit correlates Sky Chefs' monthly purchase payments to respondents, with monthly payments by respondents to Mr. Rodrigues. Thirty-four checks in payment to Rodrigues are listed on the exhibit totalling $11,413.49.

From February 1977 through February 1980, in the vast majority of cases, those monthly payments equalled one percent of the cost of products purchased by Sky Chefs from respondent Holiday during the preceding month. (Cx 2, pp. 1–20; Cx 39, pp. 1–32). The check payments to Rodrigues covering the months of February, March, April, May and June of 1980 were equal to or about equal to two percent of the cost of Sky Chefs' purchases from respondent Holiday. (Cx 2, pp. 21–24; Cx 39, pp. 33–37)

7. The record contains copies of 39 checks [1] issued to Rodrigues (Cx 39, pp. 1–38; Cx 3, p. 14) which total $13,475.57. All but two of these checks were signed by respondent Rocker.

[1] Checks which duplicate those contained in Cx 39 (and Cx 40, 41, and 42 *infra*,) were not counted; e.g. Cx 4, p.8; Cx 5, p.22, etc.

8. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms numbered 1096 and 1099 to Rodrigues which total $6,711.87.

9. In addition to the check payments as shown in complainant's exhibits 3 and 39, respondents also made payments in cash to Rodrigues during the period Larry Luxenberg served as Honolulu manager for respondent Holiday. Mr. Luxenberg made these payments upon instructions from respondent Rocker and was reimbursed by respondent Holiday. (Tr. 47-51; Cx 37)

10. Mr. Rodrigues' receipt of payments from respondents violated his employer's conflict of interest policy. (Tr. 79-82; Cx 15)

II

11. During the period from January 1977, through May 1982, respondent Holiday sold meat, meat food products, poultry and poultry products to Kauai Resort Hotel in Hawaii. During this period, Kauai Resort Hotel employed Chris Chang as general manager with purchasing responsibilities for food. Mr. Chang was responsible for the purchases from respondent Holiday.

12. In 1977, Mr. Chang began receiving monthly payments by check from respondents. Beginning in 1980 until May of 1982, the payments were made in cash by Larry Luxenberg. (Tr. 16, 51; Cx 37) Monthly sales summations made by complainant's investigator (Cx 16) show in most cases that check payments to Mr. Chang equalled two percent of the sales by respondent Holiday to Kauai Resort Hotel. Thirty-five checks in payment to Mr. Chang are listed on the exhibit totaling $9,302.41.

13. The record contains copies of 27 checks issued to Chang totaling $8,009.42. (Cx 40, pp. 1-26; Cx 17, p.5) All 27 checks were signed by respondent Rocker.

14. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms (1096 and 1099) to Chang which total $7,566.42 (Cx 26).

III

15. During the period from April 1979, through January 1980, respondent Holiday sold meat, meat food products, poultry and poultry products to Hawaiian Regent Hotel in Hawaii. During this period, the Hawaiian Regent Hotel employed Richard Albanese as executive chef, with responsibilities which included the purchase of food for the hotel. (Tr. 32-33). During the same period respondents made payments to Richard Albanese approximating one to three percent of the hotel's purchases from respondent Holiday. Monthly

sales summations made by complainant's investigator (Cx 27) list five checks in payment to Mr. Albanese totaling $3,392.60.

16. The record contains copies of five checks issued to Albanese also totaling $3,392.60. (Cx 42, pp. 1-5). Four of these checks were signed by Nat Rocker.

17. For the year 1979, respondent Holiday issued an Internal Revenue Service form 1099 to Albanese in the amount of $2,608.60.

18. The receipt by Richard Albanese of these payments from respondents violated his employer's employment policies.

IV

19. During the period from April 1977, through March 1979, respondent Holiday sold meat, meat food products, poultry and poultry products to Plantation Gardens, a resort hotel in Hawaii. The hotel employed Mel Wabinga as a chef with responsibilities for purchasing food for the hotel during this period. Monthly sales summations made by complainant's investigator (Cx 33) list 22 checks in payment to Mr. Wabinga totaling $1,771.08.

20. The record contains copies of 29 checks issued to Wabinga totaling $2,314.08 (Cx 41, pp. 1-26; Cx 34, pp. 1,2,3). Twenty-eight of the 29 checks were signed by Nat Rocker.

21. For the years 1978 and 1979, respondent Holiday issued two Internal Revenue Service forms (1096 and 1099) to Wabinga which total $1,831.21. (Cx 35)

22. If Mr. Wabinga's employers had known about these payments at the time they were made, he would have been fired. (Tr. 92)

CONCLUSIONS

All contentions of the parties (including respondents' objections regarding complainant's reply brief) have been considered in the light of the record evidence. By reason of the above findings of fact, I conclude that respondents violated sections 202(a) and 202(b) of the Act (7 U.S.C. 192(a), (b)). The respondents are ordered to cease and desist and pay a civil penalty of $50,000.00.

VIOLATIONS

Four buyers, Rodrigues, Chang, Albanese, and Wabinga, were identified as having responsibility for the purchase of meat and meat food products for their employers. All four buyers purchased such products from respondent Holiday and received payments from respondents in the form of checks totaling $27,191.67 (Findings 7,13,16,20). In addition, the record identifies two of the buyers (Rodrigues and Chang) as receiving cash payments from respondents. (Tr. 15-16, 47-51, C)

Two of the four buyers (Wabinga and Chang) testified at the hearing.

Mr. Wabinga described his business relationship with respondent Holiday at Tr. 266-268, as follows:

Q. All right. Are you familiar with a company called Holiday Food Services?

A. Yes, I do.

Q. How did you become familiar with that company?

A. Well, someone approached me from the Mainland saying that they're new in Hawaii, that they would like to promote Holiday Food in Hawaii.

Q. And when did that occur?

A. Pardon?

Q. When did that occur?

A. Year, or ——

Q. In the year, approximately.

A. Year. I think it's in '78 or '79.

Q. Okay.

A. And they asked me that they was going to promote the meat, Holiday foods, in Hawaii, that if I was interested to buy some meat. And I said, "It all depends how much it costs, and, you know, freight-wise, and everything."

Q. For whom were you working at that time?

A. At the Plantation Gardens.

Q. And what was your position?

A. Executive Chef.

Q. Did your responsibilities include the purchase of meat and meat food products?

A. Yes.

Q. Did you decide to purchase meat from Holiday Food Services?

A. Well, I said, "Yeah, I would like to try." You know, as long as the price is within range I would give them a chance to buy the—buy their meat from them.

Q. And how long did you purchase meat from Holiday Foods?

A. About a year or a year and a half.

Q. Did you receive any payments personally from Holiday Food Services during that period?

A. Yes, I did.

Q. In what form? Did you receive cash payments?

A. No, it's a check, a weekly (ph.) check.

Q. How often?

A. All depends if you order your meat from them they'll give you a check. If you don't order from them—let's say if I have enough and I didn't order from them then I wouldn't receive any.

Q. All right. Why did you receive those payments during that period?

A. Well, they told me they'd give me a little something if I did buy it from them.

Q. I'm sorry, sir, I did not hear your answer.

A. Oh. They told me if I buy meat from them it will be a little cheap and I would have payment for them—from them—for buying meat from them.

Q. And who told you that?

A. Larry Luxenberg. Is that his last name?

Q. I believe there was a man named that associated with Holiday Food.

A. What was his name again?

Q. Larry Luxenberg.

A. Yeah, that's the guy; that's the guy that I talked to, Larry Luxenberg.

Respondents challenge the accuracy of Wabinga's testimony as "confused, ambiguous and unclear." (Brief, p. 11) Respondents base this challenge upon Wabinga's identification of Mr. Larry Luxenberg as the individual he spoke to in 1978 about receiving payments from respondent Holiday. (See also Tr. 270-271)

Mr. Luxenberg owned Lux Foods, which operated in Honolulu until the operation was sold to respondents in 1974. Thereafter, in 1980, he became the general manager of respondent Holiday's operation in Honolulu (Tr. 44-47, 280-281).

While the record discloses no formal relationship between Luxenberg and respondents during the period 1974-1980, and while Wabinga might have been confused about his conversation with Luxenberg in 1978, his testimony about his receipt of check payments from respondents is clear and unambiguous, and is corroborated by his receipt of 29 checks from respondents (Finding 20).

Another buyer, Chris Chang testified. (Tr. 12-29). He testified that he received checks in the period 1976-1979, and cash thereafter through 1982 from Larry Luxenberg. Luxenberg's affidavit (Cx 37) and his testimony (Tr. 51) confirm the payment of cash.

Chang also testified that he understood the payments were for his referrals of respondents to other buyers. Chang made no introduction. He just told respondent's salesmen to "mention my name." (Tr. 26).

Mr. Chang's explanation of the reason for payments is not persuasive. The payments were not sporadic as one might expect from a casual reference here and there, but were monthly payments based in large measure on the volume of sales to his employer. (Findings of Fact 6 and 7).

Buyer Albanese and Rodrigues did not testify and could not be reached by complainant's investigator or refused to be interviewed (Tr. 98, 187-188). However, record evidence shows the receipt of payments, cash and checks to Rodrigues, and checks to Albanese, from respondents. (Findings of Fact 5-9, 15-17). Speculation about possible services rendered by these two buyers is not persuasive.

The totality of the facts contained in the record lead to the conclusion that respondents committed unfair trade practices, commonly called "commercial bribery", and thereby violated Sections 202(a) and 202(b) of the Act [2], by the payments to the four buyers named above.

[2] Sec. 202. It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or . . . (7 U.S.C. 192(a), (b)).

As complainant correctly urges (main brief pp. 8-9):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Past decisions have established commercial bribery to be a violation of the Act. *In re National Beef Packing Co.*, 36 A.D. 1722 (1977), *aff'd*, 605 F.2d 1167 (CA 10, 1979)); *In re Gol-Pak Corporation*, 27 A.D. 228 (1968); *In re Hygrade Food Products Corporation*, 26 A.D. 825 (1967).

NAT ROCKER

It is respondents' position that the testimony of Nat Rocker clearly establishes his innocence from any wrongdoing. (Brief pp. 18-28).

Of great weight in this proceeding is the fact that of the 100 payment checks to the four buyers, 96 were signed by respondent Rocker. (Findings of Fact 7,13,16,20).

Larry Luxenberg testified about the payments to the buyers, and indicated that such payments were ongoing, existing even before his arrival in Hawaii in 1980. His testimony further indicates that he was reimbursed for cash payments, and that his disbursements were on instructions from Los Angeles. (Tr. 47-51). Luxenberg's affidavit (Cx 37) states that he paid cash to various food buyers "per the instructions of Nat Rocker."

In these circumstances, Nat Rocker cannot assert that the actions of Luxenberg or of the other managers in Hawaii were outside the scope of their employment.

Further, Nat Rocker's testimony of his disinterest, lack of control, and neglect of respondent Holiday Foods is hard to believe when contrasted with his success with and attention to Holiday Meat and Provision Corporation, hereinafter called "Holiday Meat." Respondent owns 100% of the stock of the Holiday Meat

Corporation, whose current annual volume of business is about 18 million dollars. (Tr. 277-294, 310-335).

Contrary to respondents' position, the record shows a deep involvement by respondent Rocker in the management of respondent Holiday. Aside from respondent Rocker's issuance of checks and instructions to Luxenberg, previously discussed, the record discloses that Rocker, and/or his California office: maintained all the books and records for respondent Holiday (Tr. 48, 68, 327-329); did most of the purchasing (Tr. 322-324); gave detailed and daily instructions to the Honolulu office of respondent Holiday (Tr. 48; Cx 37); and regularly discussed profits and losses with the Hawaii managers. (Tr. 328-33)

Respondent Rocker cannot avoid personal responsibility here. The record demonstrates that he was responsible for the operation of the respondent corporation. *In re Pastures, Inc.*, 39 A.D. 395, and cases cited at 397 (1980).

SANCTION

The respondents' violations are serious and repeated. Section 203(b) of the Act (7 U.S.C. § 193(b)) authorizes a civil penalty of $10,000 for each violation of the Act.

In consideration of the gravity of the violations, the size of the business involved, and the effect upon the ability to remain in business, a civil penalty in the amount of $50,000.00 is imposed, in addition to an order to cease and desist.

Respondents' competitors, and the customers involved herein, were injured by respondents' violations. As noted above, the violations were serious and repeated, thus requiring the imposition of a severe sanction.

While complainant was not successful in gathering financial information fromrespondents (Tr. 337-339), the record does reveal the following:

a. Respondent Holiday is defunct, and its dissolution is anticipated. Thus the sanction imposed may possibly be levied solely against respondent Rocker.

b. Respondent Holiday suffered a loss of about $800,000 which is owing to Holiday Meats (Tr. 322).

c. Holiday Meats, wholly owned by respondent Rocker, is a successful enterprise, with a current annual volume of business of 18 million dollars. (Tr. 316, 320)

Accordingly, it would appear that the imposition of a $50,000.00 civil penalty is clearly warranted in light of the nature and seriousness of the violations committed.

Likewise, the amount of the civil penalty, though large enough to deter future violations by respondents and other potential violators, will not adversely affect respondent Rocker's ability to remain in business.

For the foregoing reasons the following order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

For the reasons set forth by the ALJ, respondents' violations are serious and repeated, occurring continuously over a 5-year period.

It is the policy of this Department to impose severe sanctions for serious or repeated violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),[3] which is set forth as Appendix A to this decision.[4] The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

[3] The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[4] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir.1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

Respondents argue that "[t]here is nothing left to deter" since "Holiday Food no longer exists" (Cross-Appeal at 7). But that argument overlooks the fact that the Department's sanction policy is meant to deter other potential violators, as well as the particular respondents involved in a pending proceeding.

Respondents contend that the $25,000 civil penalty assessed by the ALJ is too severe in view of respondents' financial condition (Cross-Appeal at 9-12). The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 193(b)):

> (b) . . . The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

The Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, *e.g.*, *In re Peterman*, 42 Agric. Dec. ____ (slip op. at 1c) (Dec. 12, 1983), *aff'd*, No. 84-1053 (10th Cir. Aug. 13, 1985) (respondent allegedly unable to pay $20,000 civil penalty should have introduced evidence to that effect at the hearing); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma v. USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as Appendix B to this decision.[5] In any event, however, this case is distinguishable from *Bosma*.

Respondent Holiday Food Services, Inc., has been out of business for several years, and respondent Rocker contends that he is planning to dissolve that corporate business. Hence the civil penalty imposed in this case cannot have any effect on respondent Rocker's ability to continue the Holiday Food Services business.

[5] *In re Upton*, 44 Agric. Dec. 2238 (slip op. at 32) (Oct. 2, 1985); *In re Saylor*, 44 Agric. Dec. 2238 (slip op. at 524-26) (Sept. 20, 1985) (final decision on remand) (respondent should have introduced evidence showing that he could not pay a $10,000 civil penalty).

The Act requires the Secretary to consider the "size of the business involved," i.e., the business involved in the particular proceeding, and the effect of the penalty on the "person's ability to continue in business," i.e., to continue in the business involved in the proceeding. The Act does not require the Secretary to consider whether the penalty will have an effect on some unrelated business venture not involved in the proceeding.

Since respondent Rocker will not continue the Holiday Food Services, Inc., meat business irrespective of any civil penalty in this case, which is the only relevant business to be considered under the Act, it is irrelevant whether a civil penalty will have any effect on respondent Rocker's ability to continue his Holiday Meat & Provision Corporation business.

Furthermore, it should be noted that complainant's investigator repeatedly requested financial information relating to Holiday Food Services, Inc., and Holiday Meat & Provision Corporation, but respondents failed to supply the requested information (with the exception of one tax return) (Tr. 186-87, 337-40). This, again, is a circumstance that distinguishes this case from *Bosma*.

In addition, even if it were relevant to determine whether a $50,000 civil penalty will affect respondent Rocker's ability to continue his separate business as Holiday Meat & Provision Corporation, he has failed to demonstrate on the record that such a civil penalty would prevent him from continuing to operate that business.[6]

Finally, it should be noted that commercial bribery is so inimical to the meat packing industry that it would be in the best interests

[6] The "Declaration of Nat Rocker" attached to respondents' cross-appeal, relating to the financial condition of his businesses, was not introduced as evidence and, therefore, cannot be considered on appeal. Also, there is no basis for reopening the hearing to receive evidence in this respect since the Department's uniform rules of practice applicable to disciplinary proceedings (7 CFR § 1.146(a)(2)) requires the same type of showing, in this respect, as court rules relating to newly discovered evidence. *In re DeJong Packing Co.*, 36 Agric. Dec. 1319, 1320 (1977) (order denying rehearing), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 795 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 428-29 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1910, 1910-11 (1981) (order denying reopening), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (reinstating *nunc pro tunc* original order of Oct. 20, 1982, *aff'd* 40 Agric. Dec. 1468), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished); *In re Winger*, 38 Agric. Dec. 182, 188 (1979, *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979). Respondents have made no showing why this information could not have been presented at the hearing.

of the meat packing industry if any person found to have engaged in commercial bribery discontinued his meat packing business. Accordingly, a civil penalty imposed for commercial bribery that prevented a person from continuing his meat packing business would be in the public interest. As stated in *In re Saylor*, 44 Agric. Dec. ——— (slip op. at 526) (Sept. 20, 1985) (decision on remand):

> The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(b)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act.

Respondents contend that the evidence is weak as to respondent Rocker's personal involvement in the violations, but the ALJ, who saw and heard the witnesses testify, found it "hard to believe" Nat Rocker's "testimony of his disinterest, lack of control, and neglect of respondent Holiday Foods" (Initial Decision at 17). There is no basis in the record for setting aside his determination in this respect.

In addition, the ALJ correctly held that an order may be issued against an individual, in the circumstances shown here (Initial Decision at 18), citing *In re Pastures, Inc.*, 39 Agric. Dec. 395, 397 (1980). In *Pastures*, it is stated (*id.*):

> Respondents [i.e., the president of the corporation and his wife, who was the sole owner and secretary-treasurer of the corporation] are in error in believing that an order cannot be issued against them as individuals unless they personally caused the corporation's insolvency by embezzlement or [mis]appropriation of funds. *Sebastopol Meat Co.* v. *Sec. of Agr.*, 440 F.2d 983, 983–986 (9th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S.D.A.*, 438 F.2d 1332, 1342–1343 (8th Cir. 1971); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. [171, 173] (Jan. 30, 1980); *In re Norwich Veal & Beef, Inc.*, 37 Agric. Dec. 1202, 1205 (1978); *In re Mid-States Livestock, Inc.*, 36 Agric. Dec. 172, 192–196 (1977), *aff'd*, 570 F.2d 701 (8th Cir. 1978); and *see Hedrick* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1025, 1030–1031 (E.D. Pa. 1978); *Fillippo* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1015–1018 (E.D. Pa. 1978).

Respondents contend that in a recent case brought against Dubuque Packing Company, in which Dubuque was charged with paying over $80,000 in commercial bribes, a $30,000 civil penalty was assessed (*In re Dubuque Packing Co.*, 44 Agric. Dec. ____ (Dec. 13, 1985)), which is about one-third the amount of the bribes paid, whereas a $50,000 civil penalty in this case would be almost twice as much as the proven bribes paid. However, it is well settled that consent orders "should be given no weight whatsoever in determining the sanction to be imposed in a litigated case" (*In re Worsley*, 33 Agric. Dec. 1547, 1569 (1974)), Appendix A at 23a. Furthermore, there is no policy of imposing a civil penalty in commercial bribery cases equal to a certain percentage of the amount of the bribes paid. (That is not one of the criteria set forth in the statute). In fact, since this is the first litigated case involving commercial bribery that has been decided by this Department after the Act was amended to authorize civil penalties, there is no prior precedent.[7]

In another case involving commercial bribery, in which the Decision and Order is being filed this day, a $50,000 civil penalty is also being imposed jointly and severally against a defunct corporation and two individuals. *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986). In *Corn State*, concern is expressed as to whether a $50,000 civil penalty is adequate to serve as an effective deterrent to commercial bribery (in view of the large profits that can be made from commercial bribery and the difficulty of detection). I have the same concern here. If complainant requests greatly increased sanctions in future similar cases, much larger civil penalties will be imposed.

Respondents contend that they have already suffered damage because of the Department's press release issued in this case, but it is well settled that any damage resulting from an agency press release is not considered in determining the sanction to be imposed in a proceeding.[8]

[7] Prior litigated cases involving commercial bribery related to offenses committed before the 1976 amendment authorizing the imposition of civil penalties. *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-36 (1977), *aff'd*, 605 F.2d 1167, 1168-69 (10th Cir. 1979); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 552-53 (1981); *In re Gol-Pak Corp.*, 27 Agric. Dec. 228, 232-35 (1968); *In re Hygrade Foods Prods. Corp.*, 26 Agric. Dec. 825, 829-32 (1967).

[8] *In re Speight*, 33 Agric. Dec. 280, 304-05 (1974); *In re Miller*, 33 Agric. Dec. 53, 81-82, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974). In *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 188 (1973), the Court upheld a suspension order under the act notwithstanding the "damaging publicity" issued by the agency. *Accord, Miller* v. *Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *Bowman* v. *USDA*, 363 F.2d 81, 86 (5th Cir. 1966).

Although there is no basis on this record for reducing the amount of the civil penalty to be imposed because of respondents' financial condition, complainant does not object to the payment of the civil penalty over a period of years. Accordingly, the order will provide for payment of the $50,000 civil penalty over a period of 4 years.

No contention is made by respondents that complainant was required to prove actual injury or likelihood of injury in order to prove a violation of § 202(a) of the Act (7 U.S.C. § 192(a)), and the issue cannot be raised at this late date in this case. But since that issue is raised in *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986), also decided this day, the discussion of that issue in *Corn State* is set forth as Appendix C to this decision.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Holiday Food Services, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Nat Rocker, individually or as owner, officer or director of any packer subject to the Act, shall cease and desist from directly or indirectly giving or offering to give, or permitting or causing to be given money or anything of more than nominal value to, or for the benefit of, an officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence any such person to purchase or promote the purchase of meat, meat food products, poultry or poultry products from or through respondents.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby assessed, jointly and severally, a civil penalty of fifty thousand dollars ($50,000).

The cease and desist provisions of this order shall become effective as to each respondent on the day after service of this order on such respondent.

The civil penalty shall be paid at the rate of $12,500 per year by certified checks made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250, with the first check due not later than the 90th day after service of this order on respondents, and the remaining checks due on the same date of the next 3 years thereafter.

APPENDIX A

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974).

U.S.D.A. SANCTION POLICY

APPENDIX B

Petition for Rehearing filed in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984) (Note: This Petition for Rehearing is printed as an appendix to *In re Saylor*, 44 Agric. Dec. 2238 (Sept. 20, 1985))

APPENDIX C

Excerpt from *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (slip op. at 37-50) (May 8, 1986)

II. Proof of Injury or Likelihood of Injury Is Not Required in Commercial Bribery Cases.

[The excerpts in the appendixes above are omitted.—Ed.]

In re: OLE SALEM PACKING CO., INC., a corporation, and GREGORY H. MITCHELL, an individual, P&S Docket No. 6668. Decided May 9, 1986.

Packer—failure to pay full purchase price—Civil Penalty—Consent.

Roberta Swartzendruber, P&S Div., OGC, for complainant.
E. Bragg Williams, Poplarville, MS, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Ole Salem Packing Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Mississippi. Corporate respondent's mailing address is P. O. Box 1018, Picayune, Mississippi 39466.

2. The corporate respondent, at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter and preparing meats for sale and shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Gregory H. Mitchell, hereinafter referred to as the individual respondent, is an individual whose business mailing address is P. O. Box 1018, Picayune, Mississippi 39466.

4. The individual respondent, at all times material herein, was:

(a) An owner, in combination with his wife, of all the corporate respondent's stock;

(b) President of the corporate respondent; and

(c) Responsible for the direction, management and control of the business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Ole Salem Packing Co., Inc., its officers, directors, agents, successors and assigns, and Gregory H. Mitchell, directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby severally and jointly assessed a civil penalty of One Thousand Eight Hundred Dollars ($1,800.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: HARRY BRODY & SONS, INC., and HERBERT S. SMALL, P&S Docket No. 6575. Decided May 14, 1986.

Packer—inaccurate or incorrect weights—commercial bribery—Civil Penalty—Consent.

Ben Bruner, P&S Div., OGC, for complainant.
Ramsey Clark, New York, NY, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harry Brody & Sons, Inc., hereinafter referred to as corporate respondent, is a corporation which had its principal place of business at 3451 Frankford Avenue, Philadelphia, Pennsylvania. It is no longer in operation.

2. Corporate respondent at all times material herein was:

(a) Engaged in the business of manufacturing and preparing meat and meat food products for sale and shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. Herbert S. Small, hereinafter referred to as individual respondent, is an individual whose mailing address is 1209 Stratford Avenue, Melrose Park, Pennsylvania 19126.

4. Individual respondent at all times material herein was:

(a) President of the corporate respondent;

(b) Owner of 100% of the outstanding stock of the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent; and

(d) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Harry Brody & Sons, Inc., its officers, directors, agents and employees, and Herbert S. Small, directly or through any corporate or any device, in connection with the purchase, sale, or distribution of meat or meat food products, shall cease and desist from directly or indirectly;

1. Invoicing and collecting from the purchasers of livestock carcasses or parts thereof on the basis of inaccurate or incorrect weights;

2. Invoicing and collecting from the purchasers of livestock carcasses or parts thereof on the basis of a weight which includes trim weight without obtaining the purchasers' consent to the inclusion of trim weight in the invoice weight;

3. Attempting to enter into, continuing, cooperating in or carrying out any conspiracy, agreement, arrangement or understanding with any officer, agent, director, or employee of any customer or prospective customer which involves the offering or giving by respondent of any money or gift of more than nominal value to or for the benefit of any such officer, agent, director, or employee of the customer or prospective customer based upon or related to the purchase of livestock, meats or meat food products by such customer or prospective customer from respondent; and

4. Attempting to induce or cause, inducing or causing, accepting or receiving favored treatment or undue preference or advantage related to the purchase, sale, or marketing of meat or meat food products, in commerce, from any customer or prospective customer based on the offering or giving by respondent, its officers, agents, directors, employees, or brokers who represent it, of money or any gift or service of more than nominal value to or for the benefit of any customer, prospective customer, or their officers, agents, directors, or employees.

In accordance with section 203(b) of the Act (7 U.S.C § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of $20,000.00, which shall be held in abeyance, provided, however, that if respondents violate this order within five (5) years from its effective date, the full amount shall immediately become due and payable.

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: LINDEN PACKING CO., INC., P&S Docket No. 6536. Decided April 7, 1986.

Hooks & rollers not uniform—misrepresentation—mismanagement of monorail scale—inaccurate weights—Civil Penalty.

Peter Train, for complainant.
Raquel Romero, Elizabeth, NJ, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*, hereinafter "the Act,"), that was instituted by a complaint and notice of hearing filed on May 8, 1985, which alleges that respondent engaged in unfair and deceptive trade practices in connection with its purchases of livestock.

The complaint alleges that during the period January 31, 1983 through December 29, 1983, respondent violated the Act (7 U.S.C. §§ 192(a) and 221) and regulations thereunder (9 C.F.R. §§ 201.73-1 and 201.99) when (1) it accounted and paid for livestock purchased on a carcass weight basis that included a tare which exceeded by five pounds the actual weight of the equipment (hooks and rollers) attached to the carcasses when weighed; (2) used hooks and rollers which were not uniform in weight; and (3) did not record the weight of the carcasses to the nearest minimum graduation on its scale.

Respondent filed an answer dated May 24, 1985, admitting the jurisdictional allegations of the complaint, but denying its commission of any violation. Subsequent to the holding of prehearing conferences and prehearing exchanges of proposed exhibits and wit-

ness lists, an oral hearing was held before me on December 3-4, 1985. Complainant was represented by Peter V. Train, Office of the General Counsel, United States Department of Agriculture, and respondent was represented by Raquel Romero, Weltchek, Prupis & Ritz, Elizabeth, New Jersey.

At the close of the oral hearing, a schedule for the filing of proposed findings of fact, conclusions, and supporting briefs was set. Briefing was completed on March 24, 1986.

Upon consideration of the entire record, briefs, and arguments, I have found that respondent did improperly account and pay for cattle on the basis of improper weighing practices. An order is being entered which directs respondent to cease and desist from such practices, specifies the manner in which respondent shall keep accounts and records in the future, and assesses a civil penalty against respondent of $20,000.00.

FINDINGS OF FACT

1. Respondent, Linden Packing Co., Inc., is a corporation which has a principal place of business at 324 Astor Street, Newark, New Jersey 07114.

2. Respondent is, and at all times material herein, was:

(a) engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) a packer within the meaning of and subject to the provisions of the Act.

3. Respondent has been in the meat packing business for over 30 years and its current Vice-President, Jack Rosenberg, is responsible for its day-to-day operations.

4. Respondent, at all times material herein, purchased a portion of its livestock on a carcass weight basis.

5. Respondent, at all times material herein, weighed its livestock purchases after their conversion into carcasses, on a Toledo monorail dial scale which depicted weights in one pound graduations, with odd numbers indicated by lines without numbers and even number indicated by both lines and numbers.

6. Respondent's plant, at all times material herein, employed a gravity dressing system in which carcasses travel on a gravity rail until they reach a washing station where they are cleansed by a pressure hose. They are then weighed on the Toledo monorail dial scale, after which they are moved into a cooler. Respondent considered installing automatic washing equipment which would have washed the carcasses after weighing, but was advised that this was not feasible due to the low water table of the land upon which the plant was built.

7. On February 9, 1968, after giving notice and considering comments by industry members and all interested persons, the Department of Agriculture, promulgated the following regulation (33 F.R. 2760-2763, 9 C.F.R. § 201.99(d)):

> "Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on the actual hot weights. The hooks, rollers and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare shall include only the weight of the equipment."

8. Departmental personnel, based upon the advice of the manufacturers of the Toledo monorail dial scale, have determined that it is reasonable to maintain the equipment in such condition that a variance of two ounces either above or below the average weight of a plant's hooks and rollers is the acceptable tolerance for its hooks and rollers to still be considered uniform in weight.

9. On May 19, 1982, Elizabeth Hughes, a marketing specialist for the Packers and Stockyards Administration, went upon respondent's premises and conducted a test of a sample of respondent's hooks and rollers which revealed that forty-two percent of those in the sample varied by more than two ounces from the average weight. She also observed that the tare setting on the scale was 20 pounds; whereas, the average weight of the hooks and rollers attached to carcasses when weighed, on the basis of those she sampled, should have been 14 pounds 12 ounces. She was advised that 5 pounds were added to the tare as a compensating deduction for the water added during the washing operation.

10. On May 20, 1982, a regional supervisor for the Packers and Stockyards Administration, sent respondent a letter by certified mail, return receipt requested, (Complainant's Exhibit 3) advising respondent:

> "Recently a survey was conducted at your plant to determine your firm's compliance with the Packers and Stockyards Act and regulations when buying livestock on a dressed weight basis.
>
> "During the survey, certain discrepancies were found and discussed with you.
>
> "You agreed to discontinue deducting five pounds for water when purchasing livestock on a dressed weight basis and to identify and keep captive enough hooks and rollers

for your weekly hot dressed weight purchases. These captive hooks must be standardized to plus or minus two ounces from their average weight and the tare on your scale set accordingly.

"It will also be necessary to record the number of livestock bought on a dressed weight basis in Section 5, Item 6, of your annual report.

"Please notify this office of the steps you are taking to implement the above requirements.

"If you have any questions, feel free to call this office at 201-246-0060."

11. Approximately one week subsequent to the May 20, 1982 letter, Ms. Hughes telephoned Mr. Rosenberg and inquired as to his actions to achieve compliance and he then advised that respondent would discountinue purchasing livestock on a dressed weight basis. A month later, Ms. Hughes spoke to Mr. Rosenberg by telephone again and he told her he had changed his mind and would continue to purchase livestock on a dressed weight basis; he was advised by Ms. Hughes that respondent would have to come into compliance.

12. Respondent's annual report for October 1, 1982 through September 30, 1983, reveals a blank space where the form requires a packer to identify its total livestock purchases during the period that were paid for on a dressed carcass basis.

13. On December 21, 1983, Vincent DiBernardo, an industrial specialist for the Packers and Stockyards Administration, went upon respondent's premises and conducted a test of a sample of respondent's hooks and rollers which revealed that sixty-five percent of those in the sample varied by more than two ounces from the average weight. He also observed that the tare setting on the scale was 20 pounds; whereas the average weight of the hooks and rollers attached to carcasses when weighed, on the basis of those he sampled, should have been 14 pounds 8 ounces.

14. In January of 1984, Ms. Hughes again went upon respondent's premises and again observed the tare setting to be 20 pounds and, believing it to be at least 5 pounds in excess of the weight of the hooks and rollers, she discussed the setting with Jack Rosenberg who told her he took 5 pounds additional tare to compensate for the water added to the carcasses when washed immediately prior to being weighed.

15. In the course of its purchase of livestock on a carcass weight basis, during the period January 31, 1983 through December 29,

1983, respondent customarily weighed carcasses with a tare setting that exceeded, by five pounds, the weight of the rollers and hooks attached to the carcasses; paid sellers and issued accountings to them based on such weights without informing them of this practice; and used hooks and rollers that were not uniform in weight. In respect to one seller alone, Fern Baker, from September 27, 1983 through December 29, 1983, respondent paid the seller $6,751.37 less than required by taking the five pound deduction for water in respect to its weighing of 1701 cattle carcasses.

16. During 1983, respondent's weighmaster always reported the individual carcass weights of livestock purchased on a carcass weight basis in terms of even numbers and never in terms of odd numbers.

17. As part of its annual report for the fiscal year that ended on September 30, 1983, respondent filed financial statements showing its sales for the year were just under 74 million dollars, its gross profits were over 3 million dollars, and its income before income tax was 1.5 million dollars.

CONCLUSIONS

1. (a) Respondent engaged in an unfair and deceptive practice and device in violation of 7 U.S.C. § 192(a) and 9 C.F.R. § 201.99, each time during the period January 31, 1983 through December 29, 1983, when it settled and made final payment for livestock purchased on a carcass weight basis that was not limited to the actual hot weights, but included as part of the tare, an additional five pounds for water and exceeded by that amount, the weight of the hooks, rollers and other equipment used in connection with respondent's weighing of the carcasses.

(b) Pursuant to 7 U.S.C. § 193(b), an order requiring respondent to cease and desist from continuing such violations is warranted and is being entered. Inasmuch as sellers were unaware of this practice, the fact that respondent had been given a prior warning but persisted in the practice, committed in excess of 1700 violations (see finding number 15, *supra*), and the fact that respondent's annual sales for the fiscal year which ended on September 30, 1983 was nearly 74 million dollars with a gross profit of over 3 million dollars, a civil penalty of $20,000.00 is also being assessed which will not affect respondent's ability to continue in business, and is well below the maximum amount that may be assessed under the Act's authorization of $10,000.00 per violation, but is sufficient to impress respondent with the gravity of the offense and the need for future compliance.

2. (a) Respondent further violated 7 U.S.C. § 192(a) and 9 CFR § 201.99, each time during the period January 31, 1983 through December 29, 1983, when it used hooks and rollers which were not uniform in weight.

(b) Pursuant to 7 U.S.C. § 193(b), an order requiring respondent to cease and desist from continuing such violations is warranted and is being entered, but inasmuch as the violations were technical in nature, the assessment of a civil penalty for these violations is not appropriate.

3. The practice of respondent's weighmaster of reporting all carcass weights on the basis of even numbers only, was not shown to have disadvantaged sellers any more than it did respondent and cannot be said to be in violation of the Act. The Departmental regulation cited by complainant (9 CFR § 201.73-1) applies to the weighing of drafts of livestock and not to dressed carcasses.

DISCUSSION

The gist of the violations committed by respondent was its unauthorized deduction of five pounds for the water that may have been added to the weight of carcasses when it cleaned them just before weighing. The Departmental regulation, promulgated only after considerable industry discussion to make intelligible the prices per pound packers quote to sellers, clearly prohibits any deduction from the actual weight of a carcass other than the actual weight of attached equipment; i.e., the hooks and rollers. Respondent would justify its practice on the basis of the low water table of the land where its plant is situated. It was advised by an engineer that, because of this fact, automatic washing equipment could not be installed because the sewers that service the plant would be caused to back up. However, respondent has not presented any evidence that, after it received a warning that its practices were in violation of the Act and the regulation, it was unable to use the existing pressure hose so as to cleanse the carcasses after, instead of before, weighing them. Moreover, other packers with similar problems have elected to buy livestock on the basis of live weights instead of carcass weights and respondent, at first, advised the investigator that it would switch to such purchasing practice. But, it later changed its decision and persisted in its practices despite actual knowledge that it was violating a Departmental regulation in implementation of the section of the Act that proscribes unfair and deceptive practices.

A civil penalty of $20,000.00 is warranted by respondent's wilful violations of the express language of the regulation when it persisted in adding five pounds to the tare on the carcass weights upon

which it paid sellers after it received express warnings and had promised to comply. This penalty is $5,000.00 less than the penalty recommended by complainant and reflects the fact that the charges respecting the weighmaster's practice of recording weights at the nearest even pound have been dismissed and that no civil penalty is being assessed for respondent's failure to use hooks and rollers of uniform weights which was a technical violation not shown to be of benefit to respondent at the expense of sellers.

Accordingly, the following Order is being entered.

ORDER

Respondent Linden Packing Co., Inc., its officers, directors, agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Failing to settle and make final payment for livestock purchased on a carcass weight basis on the actual hot carcass weight of such livestock;

2. Using hooks and rollers in the weighing of livestock purchased on a carcass weight basis that are not uniform in weight;

3. Using a tare when weighing livestock carcasses greater than the actual weight of the hooks, rollers, gambrels or other equipment being used during such weighing;

4. Operating any monorail scale owned or controlled by it unless the tare on such scale has been checked and the scale's tare has been correctly and properly adjusted prior to the start of each day's operations, and as often as necessary during each day's operations to ensure that the tare is proper;

5. Failing to maintain and operate any livestock or monorail scale owned or controlled by it in such a manner as to ensure accurate and correct weights;

6. Weighing livestock, livestock carcasses or parts thereof, or causing them to be weighed, at other than the true and correct weights; and

7. Accounting to and paying the sellers on the basis of inaccurate or incorrect weights.

Respondent Linden Packing Co., Inc., shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its operations subject to the Packers and Stockyards Act, including hot scale sheets, accounts of sale and purchase invoices showing the true and accurate hot weight of livestock purchased on a carcass weight basis.

Respondent Linden Packing Co., Inc., is assessed a civil penalty in the amount of $20,000.00, which shall be payable by certified check or money order to the Treasurer of the United States.

Respondent Linden Packing Co., Inc., shall deliver a copy of this Decision and Order to all of its personnel whose duties or responsibilities include, in whole or in part, the operation of its livestock and monorail scales, the weighing of livestock or livestock carcasses, and the accounting to and payment of the sellers of livestock.

This Decision and Order shall become final 35 days after service hereof, unless appealed within 30 days of service (9 CFR §§ 1.145(a), 1.142(c)).

A copy of this Order shall be served upon the parties.

[Decision and Order became final May 15, 1986—Ed.]

In re: SELECTED MEATS, INC., JOSEPH A. MEINDL and ROBERT D. HINDSLEY, P&S Docket No. 6430. Decided May 16, 1986.

Packer—issuing insufficent funds checks—failure to pay when due—custodial accounts—Civil Penalty—Consent.

Eric Paul, for complainant.
Virgil L. Beeler, Indianapolis, IN, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrative, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint as modified below and specifically admit the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Selected Meats, Inc., hereinafter referred to as the corporate respondent, is an Indiana corporation whose principal place of business is located in Kingsford Heights, Indiana, and whose mailing address is P.O. Box 471, Kingsford Heights, Indiana 46346.

2. The corporate respondent at all times material herein prior to the suspension of livestock purchase operations on May 3, 1984, was:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. The corporate respondent's average annual purchases of livestock prior to May 3, 1984, exceed $500,000.00.

4. Joseph A. Meindl, hereinafter referred to as respondent Meindl, is and at all times material herein was:

(a) An individual whose address is 906 East 20th Street, La Porte, Indiana;

(b) President of the corporate respondent;

(c) Owner of at least a 55 percent interest in the corporate respondent's outstanding stock; and

(d) In combination with respondent Hindsley, responsible for the direction, management and control of the operation of the corporate respondent.

5. Robert D. Hindsley, hereinafter referred to as respondent Hindsley, is and at all times material herein was:

(a) An individual whose address is 6256 South Range, R.R. #3, La Porte, Indiana 46350;

(b) Vice President of the corporate respondent until at least April 30, 1984;

(c) Owner of a 45 percent interest in the corporate respondent's outstanding stock until at least April 30, 1984;

(d) In combination with respondent Meindl, responsible for the direction, management and control of the operation of the corporate respondent;

(e) Engaged in the business of buying and selling livestock in commerce for his own account; and

(f) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

In re: HARRY P. REDMAN, P&S Docket No. 6613. Decided May 20, 1986.

Dealer—failure to meet bonding requirements—Suspension—Consent.

Eric Paul, for complainant.
Donald G. Beattie, Altoona, PA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Harry P. Redman, doing business as Redman & Son, hereinafter referred to as the respondent, is an individual whose business mailing address is P. O. Box 435, Mitchellville, Iowa 50169.

2. The respondent is, and at all times material herein was;

(a) Engaged in the business of buying livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Harry P. Redman, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of five (5) years and thereafter until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the five (5) year period.

The provisions of this order shall become effective on the sixth day after service of this decision of the respondent.

Copies of this decision shall be served on the parties.

In re: RICHARD TODD, P&S Docket No. 6664. Decided May 21, 1986.

Dealer—failure to meet bonding requirements—Suspension—Civil Penalty—Consent.

Eric Paul, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Richard Todd, doing business as Circle T Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is Box 147, Afton, Oklahoma 74331.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Richard Todd, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand One Hundred Dollars ($2,100.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: ROYAL CREST MEATS, INC., P&S Docket No. 6643. Decided April 15, 1986.

Packer—failure to comply with bonding requirements—cease and desist—Civil Penalty—Default.

Eric Paul, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

(c) Respondent's average annual purchases of livestock exceed $500,000.00.

2. The Packers and Stockyards Administration notified respondent by certified mail on August 20, 1985, that the $10,000.00 surety bond it maintained to secure the performance of its livestock obligations under the Act would terminate on October 29, 1985. Respondent was further informed that if it continued to buy livestock in commerce for purposes of slaughter without bond coverage or its equivalent, it would be in violation of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondent has continued to buy livestock in commerce for purposes of slaughter without filing and maintaining a reasonable bond or its equivalent.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Royal Crest Meats, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a packer, shall cease and desist from engaging in the business of a packer, in commerce, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00)

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[The Decision and Order became final on May 26, 1986.—Ed.]

In re: CHARLES RAY STAFFORD and ROBERT E. STAFFORD, P&S Docket No. 6445. Decided May 29, 1986.

Dealer—market agency—failure to meet bonding requirements—Civil Penalty—Consent.

Peter Train, P&S Div., OGC, for complainant.
Kent O. Hyde, Springfield, MO, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C., Section 181 *et seq.*) by a Complaint filed by the Administrator,Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR, Section 201.1 *et seq.*). This Decision is entered pursuant to the consent Decision provisions of the Rules of Practice applicable to this proceeding (7 CFR, section 1.138).

The respondents admit the jurisdictional allegations in Paragraph I of the Complaint, and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Charles Ray Stafford and Robert E. Stafford, hereinafter referred to as "Respondents," are partners doing business as Stafford Brothers. Their business mailing address is 1323 West Locust, Springfield, Missouri 65803.

2. Respondents are, and at all times material herein were:

(a) Engaged in business as a dealer, buying and selling livestock in commerce for their own account and as a market agency to buy livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for their own account and as a market agency to buy livestock on a commission basis.

CONCLUSIONS

The Respondents, having admitted the jurisdictional facts, and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondents, Charles Ray Stafford and Robert E. Stafford, their agents and employees, directly and through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents have filed and presently maintain the reasonable bond or its equivalent as required by the Act and regulations and therefore no suspension of their registration is warranted. That Respondents are hereby assessed a civil penalty in the amount of One Thousand and No/100 ($1,000.00) Dollars, which has been paid and receipt acknowledged in open court.

The provisions of this Order shall become effective on the sixth day after service of this Order on the Respondents.

Copies of this Decision shall be served upon the parties.

In re: WESTERN STOCKYARDS CORPORATION, P&S Docket No. 6680. Decided May 30, 1986.

Market agency—custodial account—misuse of funds—Suspension—Civil Penalty—Consent.

John J. Casey, P&S Div., OGC, for complainant.
Daniel Olsen, Kansas City, MO, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Western Stockyards Corporation admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of

settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Western Stockyards Corporation, hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Texas. It is doing business as Amarillo Livestock Auction Company, and as Amarillo Cattle Company, with a principal place of business located at Amarillo, Texas, and a mailing address of 100 S. Manhattan, P.O. Box 30668, Amarillo, Texas.

2. Respondent among other things is, and at all times material herein was:

a. Engaged in the business of conducting and operating the Amarillo Livestock Auction Company stockyard, a posted stockyard under the Act;

b. Engaged in the business of selling livestock on a commission basis; and

c. Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Western Stockyards Corporation, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds of Amarillo Livestock Auction Company, within the time and in the amounts prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts equal to proceeds receivable from sales of consigned livestock;

2. Transferring funds, from the same custodial account to their general account, in excess of lawful charges and sums due to respondent as authorized by section 201.42(d) of the regulations (9 CFR § 201.42(d)); and

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of net proceeds to the owners, con-

signors or shippers of such livestock, or for payment of amounts due the respondent for lawful marketing charges.

Respondent Western Stockyards Corporation is suspended as a registrant under the Act for a period of two (2) weeks, beginning July 6 and ending July 19, 1986, and thereafter until such time as it demonstrates that the shortage in the Custodial Account for Shippers' Proceeds of Amarillo Livestock Auction Company has been eliminated. When respondent Western Stockyards Corporation demonstrates that the shortage in the custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the two-week period.

Respondent Western Stockyards Corporation is hereby assessed a civil penalty in the amount of twenty-five thousand dollars ($25,000.00), to be paid by check delivered to the attorney for complainant, payable to the United States Treasury, on or before July 7, 1986.

The provisions of this order shall become effective upon service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: CIRCLE B. MEAT CO., INC., d/b/a FLORIDA BONELESS BEEF and CIRCLE B. PORTION MEAT CO., GEORGE E. MUELLER, SR., and JAY A. MUELLER, P&S Docket No. 6614. Decided April 25, 1986.

Packer—issuing insufficient funds checks—inventories—dissipation of trust assets—failure to pay when due—Civil Penalty—Default.

Allan Kahan, for complainant.
Robert L. Williams, Venica, FL, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER WITH RESPECT TO CIRCLE B. MEAT CO., INC., AND GEORGE A. MUELLER, SR., UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the

Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents Circle B. Meat Co., Inc., and George A. Mueller, Sr., have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing pertaining to respondents Circle B Meat Co., Inc., and George A. Mueller, Sr., which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Circle B Meat Co., Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of Florida, doing business as Florida Boneless Beef and Circle B Portion Meat Co. Its business mailing address is P. O. Drawer 412, Dade City, Florida 34297.

(b) The corporate respondent was, at all times material herein:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter;

(2) Engaged in the business of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(3) A packer within the meaning of the Act and subject to the provisions of the Act.

(c) George E. Mueller, Sr., hereinafter referred to as respondent George Mueller, is an individual whose mailing address is Box 044, Bushnell, Florida 33513.

(d) Respondent George Mueller is, and at all times material herein was:

(1) Vice-President and a director of the corporate respondent; and

(2) Responsible for the management, direction and control of the practices and activities of the corporate respondent.

(e) Respondent George Mueller was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

2. As of January 3, 1984, the corporate respondent's financial condition failed to meet the requirements of the Act. On said date, the corporate respondent filed a Chapter XI Petition in the United States Bankruptcy Court for the Middle District of Florida.

3. (a) The corporate respondent, under the management, direction and control of respondent George Mueller, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, and at divers other times, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of August 1, 1985, there remained unpaid by respondents approximately $130,399.30 for such livestock purchases.

4. The corporate respondent, under the management, direction and control of respondent George Mueller, in connection with their operations as a packer, on or about the dates and in the transactions set forth in paragraph IV of the Complaint and Notice of Hearing, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

5. The corporate respondent, under the management, direction and control of respondent George Mueller, failed to hold in trust and wilfully dissipated inventories of meat and meat food products which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that:

(a) On January 6, 1984, respondents sold 4860 pounds of 50/50 beef trim to Swift & Co., Orlando, Florida for $1,980.00. The proceeds from said sale were distributed by respondents to Sam Cohen, United Telephone and M&M Cattle. The payments constitute dissipations of trust assets.

(b) On January 20, 1984, respondents sold 9000 pounds of 50/50 beef trim to Swift & Co., Orlando, Florida for $3,960.00. Respondents used the proceeds from said sale to make payments to U.S. Leasing, United Telephone, Sumter Electric, and Grafton & Sons, Inc., made two loan payments totaling $417.75, and obtained $1,290.66 in currency, the disposition of which is unaccounted for. The payments constitute dissipations of trust assets.

6. The corporate respondent, under the management, direction and control of respondent George Mueller, failed to hold in trust inventories of livestock which were required to be held in trust for the benefit of all unpaid cash sellers of livestock until such sellers were paid, in that, during the period October 24, 1983, through December 12, 1983, respondents purchased 67 head of livestock from Jacksonville Livestock Auction Company, Inc., Whitehouse, Florida, and North Florida Farmers Livestock Market, Inc., Lake City, Florida for $7,847.56. Respondents' records contain no indication of the slaughter or other disposal or disposition of this livestock.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the corporate respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Findings of Fact 3 and 4 herein, respondents Circle B Meat Co., Inc., and George Mueller wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Findings of Fact 5 and 6 herein, respondents Circle B Meat Co., Inc., and George Mueller wilfully violated sections 202(a) and 206(b) of the Act (7 U.S.C. §§ 192(a), 196(b)).

ORDER

Respondent Circle B Meat Co., Inc., its officers, directors, agents and employees, and respondent George E. Mueller, Sr., directly or through any corporate or other device, in connection with their operations as a packer, shall cease and desist from:

1. Purchasing livestock while insolvent, i.e., while current liabilities exceed current assets, unless the respondents pay the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or wire transfer;

2. Failing to pay or failing to pay, when due, for livestock;

3. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks when presented;

4. Engaging in any act or practice for the purpose of converting to their own personal use or gain assets required to be held in trust for the benefit of unpaid cash sellers of livestock; and

5. Failing to hold in trust livestock purchased in cash sales and all inventories of or receivables or proceeds from meat, meat food products or livestock products derived therefrom required to be held in trust for the benefit of unpaid cash sellers of livestock, pursuant to section 206(b) of the Packers and Stockyards Act (7 U.S.C. § 196(b)), until full payment of the amounts due under the trust have been received by such unpaid

In re: COUNTRY CUTS OF IOWA, INC., DAVID F. OLSON, LUTHER GESME, JACK L. WARD and RICHARD HOBSON, P&S Docket No. 6515. Decided June, 6, 1986.

Packer—failure to pay full purchase price—commercial bribery—Civil Penalty—Consent.

Ben Bruner, P&S Div., OGC, for complainant.
William Kevin Stoos, Sioux City, IA, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Country Cuts of Iowa, Inc., hereinafter referred to as respondent Country Cuts, is a corporation under the laws of the State of Iowa with its principal place of business in Sioux City, Iowa. The business mailing address of the corporation is 525 Chambers Street, Sioux City, Iowa 51101.

2. Respondent Country Cuts, at all times material herein was:

(a) Engaged in the business of manufacturing and preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

3. David F. Olson, hereinafter referred to as respondent Olson, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

4. Respondent Olson, at all times material herein, was:

(a) Secretary and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

(c) President and a member of the Board of Directors of Mid-America Lamb Processing, Inc., hereinafter referred to as Mid-America; and

(d) Owner of 12.1% of the outstanding stock of Mid-America.

5. Luther Gesme, hereinafter referred to as respondent Gesme, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

6. Respondent Gesme, at all times material herein, was:

(a) Treasurer and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

(c) Vice President and a member of the Board of Directors of Mid-America; and

(d) Owner of 12.1% of the outstanding stock of Mid-America.

7. Jack L. Ward, hereinafter referred to as respondent Ward, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

8. Respondent Ward, at all times material herein, was:

(a) Vice President and a member of the Board of Directors of respondent Country Cuts;

(b) Owner of 20% of the outstanding stock of respondent Country Cuts;

(c) Secretary-Treasurer and a member of the Board of Directors of Mid-America; and

(d) Owner of 14.0% of the outstanding stock of Mid-America;

9. Richard M. Hobson, hereinafter referred to as respondent Hobson, is an individual whose business mailing address is 111 South Main Street, Paullina, Iowa 51046.

10. Respondent Hobson, at all times material herein, was:

(a) President and a member of the Board of Directors of respondent Country Cuts; and

(b) Owner of 20% of the outstanding stock of respondent Country Cuts.

11. Respondents Olson, Gesme, Ward and Hobson, acting in concert, at all times material herein were responsible for the direction, management and control of respondent Country Cuts.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Country Cuts of Iowa, Inc., David F. Olson, Luther Gesme, Jack L. Ward and Richard Hobson, their officers, directors agents, employees, successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from

1. Failing to pay the full purchase price of meat;

2. Engaging in the practice of making unduly or unreasonably preferential payments to any person or subjecting any person to any undue or unreasonable prejudice or disadvantage in connection with meat or meat food products purchased in commerce.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents Olson, Gesme, Ward and Hobson are jointly and severally assessed a civil penalty in the amount of Four Thousand Dollars ($4,000.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties. Country Cuts of Iowa, Inc.

In re: DOUGLAS B. GRANT, an individual, and GRANT LIVESTOCK INC., a corporation, P&S Docket No. 6570. Decided April 25 1986.

Dealer—failure to meet bonding requirements—insolvency—issuing insufficient funds checks—failure to pay full purchase price—prohibited from engaging in business while insolvent—Default.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the re-

spondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Douglas B. Grant, hereinafter referred to as the respondent, is an individual whose business mailing address is 1115 West Green Street, Cheraw, South Carolina 29520.

(b) The individual respondent at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account;

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

(3) Doing business under the name of the corporate respondent, Grant Livestock, Inc.;

(4) President of and 100% stockholder of the corporate respondent; and

(5) Responsible for the direction, management and control of the corporate respondent.

(c) Grant Livestock, Inc., hereinafter referred to as the corporate respondent, is engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

(d) The corporate respondent is not registered with the Secretary of Agriculture in any capacity subject to the Act.

2. During the period January through August 1984, respondents engaged in business as a dealer buying and selling livestock in commerce for their own account without having and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

3. (a) As of January 31, 1985, the individual respondent had current liabilities totalling $75,579.73 and no current assets. As of January 31, 1985, the corporate respondent had current liabilities of $57,099.03 and no current assets.

(b) The individual respondent's and corporate respondent's current liabilities presently exceed their current assets.

4. Respondents, in connection with their business as a dealer, on or about the dates and in the transactions set forth in paragraph

IV of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

5. (a) Respondents, on or about the dates and in the transactions specified in paragraph IV and in the transactions specified in paragraph V of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of July 1, 1985, there remained unpaid by the respondents a total of $60,959.73 for such livestock purchases.

6. Respondents, in connection with their business subject to the Act, failed to keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business, in that respondents failed to keep and maintain a record of accounts payable and accounts receivable, buyer's bills, seller's invoices, all bank statements and cancelled checks and all records of their assets and liabilities.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 3 herein, respondents' financial condition does not meet the requirements of the Act (7 U.S.C. 204).

By reason of the facts found in Findings of Fact 4 and 5 herein, the respondents have wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b).

By reason of the facts found in Finding of Fact 6 herein, respondents have violated section 401 of the Act (7 U.S.C. 221).

ORDER

The individual respondent, directly or through any corporate or other device, and the corporate respondent, its officers, directors, agents, employees successors and assigns, in connection with their business subject to the Act shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the ac-

count upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of livestock; and

4. Failing to pay the full purchase price of livestock.

The respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including a record of accounts payable and accounts receivable, buyer's bills, seller's invoices, all bank statements and cancelled checks and all records of their assets and liabilities.

Individual respondent Grant is suspended as a registrant under the Act for a period of six months and thereafter until he demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements of the Act and regulations. When the individual respondent demonstrates that he is no longer insolvent and that he is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the six month period.

Corporate respondent Grant Livestock, Inc., is prohibited from operating subject to the Act for a period of six months and thereafter until it demonstrates that it is no longer insolvent and that it is in full compliance with the bonding requirements of the Act and regulations. When the corporate respondent demonstrates that it is no longer insolvent and that it is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating the prohibition after the expiration of the six month period.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[Decision and Order became final on June 7, 1986.—Ed.]

In re: CELIVO NICK FARINELLI, JR. P&S Docket No. 6642. Decided April 24, 1986.

Market agency—insolvency—issuing insufficient funds checks—failure to pay when due—Suspension—Default.

Andrew Stanton, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent's financial condition does not meet the requirements of the Act and that the respondent wilfully violated the Act.

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Celivo Nick Farinelli, Jr., hereinafter referred to as respondent, is an individual whose business mailing address is 10018 No. Alves Road, Ballico, California 95303.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce for his own account.

2. (a) On July 22, 1985, respondent filed with the United States Bankruptcy Court, Eastern District of California, a voluntary petition pursuant to Chapter 7 of the Bankruptcy Act, which indicates

that respondent had current assets of $4,000.00 and current liabilities of $97,669.00, resulting in an excess of current liabilities over current assets in the amount of $93,669.00.

(b) Respondent's current liabilities presently exceed his current assets.

3. (a) Respondent, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, in connection with the purchase of livestock, issued checks which, when presented for payment, were not paid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the accounts upon which such checks were drawn.

(b) Respondent, on or about the dates and in the transactions set forth in paragraphs III(a) and (b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) In connection with the livestock transactions set forth in paragraphs III(a) and (b) above, there remains unpaid a total of $31,295.80.

4. In connection with the transactions set forth in paragraph III of the complaint, and on or about the transactions set forth in paragraph IV of the complaint, respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock.

5. Respondent, in connection with his operations as a dealer, during the period April 1, 1985, through August 15, 1985, failed to create, keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions subject to the Act and regulations, in that respondent failed to create, keep and maintain fully completed purchase and sales invoices.

CONCLUSIONS

ORDER

Respondent Farinelli, individually or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Act, including fully completed purchase and sales invoices.

Respondent Celivo Nick Farinelli, Jr., is suspended as a registrant under the Act for a period of five (5) years, provided, however, that a supplemental order will be issued terminating this suspension at any time after the expiration of 45 days upon demonstration by respondent that all livestock sellers have been paid in full, provided further that this suspension may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant or packer after the expiration of the 45 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[Decision and Order became final on June 11, 1986.—Ed.]

In re: JOHN A. SCHOLL, P&S Docket No. 6684. Decided June 13, 1986.

Bonding required—suspended—Civil Penalty—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administra-

tor, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. John A. Scholl, hereinafter referred to as the respondent, is an individual whose business mailing address is 218 H West Route 313, Perkasie, Pennsylvania 18944.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent John A. Scholl, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: OWEN A. BOARDMAN, P&S Docket No. 6694. Decided June 13, 1986.

Maintain adequate bond—suspended—Civil Penalty—Consent.

Ben E. Bruner, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Owen A. Boardman, doing business as 81 Hog Company, hereinafter referred to as the respondent, is an individual whose business mailing address is 1601 So. 1st Avenue, Norfolk, Nebraska 68701.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Owen A. Boardman, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Five Hundred Dollars ($1,500.00).

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

ment of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Jay Rippy, Inc., doing business as Cattleman's Livestock Commission Co., hereinafter referred to as the respondent, is a corporation incorporated under the laws of Texas, whose business mailing address is Highway 54, Dalhart, Texas 79022.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Cattleman's Livestock Commission Co. stockyard, a stockyard posted under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a dealer buying and selling livestock in commerce for its own account, and a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Jay Rippy, Inc., its agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: RICHARD N. GARVER. P&S Docket No. 6449. Decided June 19, 1986.

Insufficient funds checks—Failure to pay when due—Suspension of registration.

The Judicial Officer affirmed that part of Chief Judge Campbell's order requiring respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks, and suspending respondent's registration for 2 years and thereafter until he is no longer insolvent, but reversed that part of the order holding all but 30 days of the suspension period in abeyance. The fact that insufficient funds checks were issued when the bank lawfully and unilaterally terminated respondent's over-draft protection without notice is not a defense. A violation is willful if respondent intentionally does an act which is prohibited, or acts with careless disregard of statutory requirements. The test of insolvency is whether current liabilities exceed current assets. Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. The failure to pay promptly and in full for livestock and the issuance of insufficient funds checks violate sections 312(a) and 409 of the Act. Severe sanction policy explained. To permit respondent to continue in the livestock industry after a 30-day active suspension period would seriously undercut the deterrent value of the 2-year suspension order. The fact that respondent's creditors would receive a token repayment of the indebtedness if he remains in business is outweighed by the national interest in having fair and competitive conditions in the livestock industry.

Peter V. Train, for complainant.
Thomas R. Smith, for respondent.
John A. Campbell, Chief Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on January 29, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) ordering respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks. The order also suspends respondent's registration for 2 years and thereafter until he is no longer insolvent, except that all but 30 days of the suspension period is held in abeyance.

On March 4, 1986, complainant, seeking to eliminate that portion of the order holding the suspension order in abeyance, appealed to

* *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On April 21, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, I agree with complainant's position on appeal. The ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize, except that the provisions of the order holding the suspension order in abeyance are eliminated, together with the ALJ's reasons therefor. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereafter referred to as the "Act", instituted by a complaint filed on November 8, 1984, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint charges that the respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204) and that he willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by issuing nonsufficient funds checks and failing to pay, when due, for livestock.

Respondent filed an answer on January 2, 1985, in which he admitted all but one of the material allegations of the complaint. An oral hearing was held in Cincinnati, Ohio on September 18, 1985. Respondent was represented by Thomas R. Smith, Esq., and complainant was represented by Barbara S. Harris of the Office of the General Counsel. At the close of the hearing the time was set for the filing of briefs.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 405c-405g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

FINDINGS OF FACT [1]

1. Richard N. Garver, hereafter referred to as the respondent, is an individual whose business mailing address is 9226 Hiner Road, Wooster, Ohio 44691.

2. The respondent, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. As of September 30, 1984, the respondent's current liabilities exceeded his current assets.

4. Respondent's current liabilities presently exceed his current assets.

5. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

DATE OF CHECK (1984)	CHECK ISSUED TO	NO. OF HEAD	AMOUNT OF CHECK
9/22	Paul Stewart	75	27,454.61
9/22	Marietta Livestock Sales	28	9,907.15
9/17	Scio Livestock Auction	11	3,407.96
9/23	Scio Livestock Auction		1,319.27
9/15	Bill Martin		36,084.40
9/18	Producer's Lvsk. Assoc.	132	67,369.99
9/24	Producer's Lvsk. Assoc.	215	130,063.83
9/18	Producer's Lvsk. Assoc.	44	32,932.47
9/19	Producer's Lvsk. Assoc.	45	32,277.67
9/19	Producer's Lvsk. Assoc.	128	64,061.78
9/24	Producer's Lvsk. Assoc.	211	141,303.32
9/15	Athens Livestock	40	12,213.97
9/15	Jerry Caldwell	163	45,231.54
9/20	Jerry Caldwell	274	73,271.71

6. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below and in Finding of Fact No. 5, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

[1] Findings 1 through 7, accepted as accurate by respondent, are restated herein. Findings 8, 9, and 10 were proposed by respondent and are included herein, along with my additional findings 11 through 16.

1984 DATE OF PURCHASE	PURCHASED FROM	AMOUNT	NO. OF HEAD
9/24	Carrollton Livestock Auction	5,086.65	14
9/17,19	Muskingum Livestock Sales	19,408.10	58
9/22	Paul Stewart	32,451.65	97
9/8,15,22	Barnesville Livestock	15,794.76	92
9/20	Chickasaw Stock Yard	4,082.04	10
	Scio Livestock Auction	2,177.38	
9/21	Livestock Market of Spencer	7,299.35	20
9/3,10,11	Bill Martin	202,460.18	432
9/11,18	Roger Taylor	31,609.50	82
8/10	Athens Livestock	1,239.00	1
9/15	Athens Livestock	9,199.50	26
9/22	Athens Livestock	8,717.11	26
9/22	United Livestock Sales Co.	23,306.87	64
9/24	Jerry Caldwell	13,705.88	55

7. As of September 18, 1985, there remained unpaid a total of at least $700,000.00 for such livestock purchases set forth in Findings of Fact Nos. 5 and 6.

8. For ten (10) years prior to September, 1984, respondent had a business arrangement with his bank under the terms of which the bank honored all overdrafts on his account and charged respondent a fee established by the bank for doing so.

9. At the time that respondent issued the checks identified in Finding No. 5, the arrangement with the bank was in full force and effect and respondent had no reason to believe that the checks would not be honored by his bank.

10. Respondent did not provide checks to persons from whom he had purchased cattle knowing that those checks would be returned because of insufficient funds.

11. Respondent's bank arrangement, noted in Findings 8 and 9, whereby the bank would pay for respondent's overdrafts, was secured by property. When the property was sold there was no longer any collateral to secure respondent's line of credit, and the bank terminated the agreement.

12. Respondent's bookkeeping methods were archaic if not primitive. He maintained no records of accounts receivable and, consequently, had no way of knowing how much he was owed or by whom. For example, respondent testified that it was his custom to visit his bookkeeper once a month, taking all of his bills, sales slips, and bank statements to her in a grocery bag.

13. Since early 1985, respondent has been working as a commissioned buyer of livestock for Elden Ginn who operates a stockyard

and sells cattle on a commission basis only. In order to have respondent work for him, it was necessary for Mr. Ginn to increase his own bond from $55,000.00 to $100,000.00.

14. Under respondent's arrangement with Ginn, respondent is paid $275.00 per week for salary and expenses. All commissions earned by him are segregated and (except for taxes, a $100.00 per month payment to Ginn's bookkeeper, and respondent's $275.00 salary) are distributed to respondent's creditors quarterly. The arrangement is contained in respondent's Exhibit No. 1. Respondent acts purely as an agent for Ginn and has no access to funds.

15. At the time of the hearing (September 18, 1985), approximately $4,800.00 had been distributed to creditors under the arrangement with Ginn and it was expected that approximately $6,000.00 more would be paid within several weeks of the hearing.

16. Respondent had not been suspended under the Act prior to this proceeding.

CONCLUSIONS

All contentions of the parties have been considered in the light of the record evidence. By reason of the above findings of fact, it is concluded that respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204), and that respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by failing to pay, when due, and by issuing nonsufficient funds checks, for livestock. The order proposed by complainant is issued. . . .

WILLFUL VIOLATIONS OF THE ACT

Complainant correctly contends that respondent's failure to pay for livestock and respondent's issuance of nonsufficient funds checks were willful violations of Sections 312(a) and 409 of the Act.

Respondent admits such practices but argues that his relationship with his bank and the over-draft protection the bank extended to him demonstrate that he did not willfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's overdraft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.

A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally terminated

his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail. As stated in *In re Thumb Auction Markets, Inc.*, 37 A.D. 164, 167-168 (1977). "Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements. . . ."

Decisions under the Act and regulations have established that a line of credit or over-draft protection extended by a bank is no defense to a charge of insolvency or custodial account violations. *In re Thumb Auction Markets, Inc., supra; In re Hugh B. Powell,* 41 A.D. 1354, 1360 (1982); *In re Sechrist Sales Co.,* 36 A.D. 665, 668, 670-75 (1977); *In re Harry Hardy,* 33 A.D. 1383, 1401 (1974). Similarly, over-draft protection cannot be a defense to a charge of issuing insufficient funds checks.

A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182, 185, 187 (1973); *Goodman* v. *Benson,* 286 F.2d 896, 900 (CA 7 1961); *In re Miller,* 33 A.D. 53, 83-87, *aff'd sub nom., Miller* v. *Butz,* 498 F.2d 1088 (CA 5 1974); *In re Lufkin Livestock Exchange, Inc.,* 27 A.D. 596, 609 (1968).

Here, the practices engaged in by respondent must be characterized as willful.

Respondent operated completely in the dark regarding the financial condition of his business. He maintained no record of his sales and hence did not know who owed him or how much he was owed. He relied solely on a credit arrangement with a bank to pay his over drafts, and then sold the property which was the collateral for the credit arrangement. This state of affairs led to the respondent's failure to pay for livestock and his issuance of nonsufficient funds checks. At the very least respondent's actions and course of conduct were in careless disregard of the requirements of the Act.

On fourteen separate occasions, respondent issued checks in purported payment for livestock which were returned for nonsufficient funds in his account. In another fourteen transactions, respondent admits that he failed to give his sellers payment for the livestock he purchased. The failure to pay promptly and in full for livestock and the issuance of "nonsufficient funds" checks have been held to violate Sections 312(a) and 409 of the Act. *Lewis* v. *Butz,* 512 F.2d 681, 682-83 (CA 8 1975); *In re Bryan,* 36 A.D. 37, 42 (1977); *In re Mid-States Livestock, Inc.,* 37 A.D. 547, 561-562 (1977), *aff'd sub nom Van Wyk* v. *Bergland,* 570 F.2d 701, 704-705 (CA 8 1978); *In re Trenton Livestock, Inc.,* 41 A.D. 1965 (1982); *In re Edzards,* 37 A.D. 1880, 1887 (1978).

In addition, respondent admitted that as of September 30, 1984, his current liabilities exceeded his current assets and that as of the date of the filing of the complaint, his current liabilities also exceeded his current assets. Under the Act, the principal test of insolvency is whether current liabilities exceed current assets. This test has been reviewed and affirmed by the Fifth Circuit in *Bowman* v. *United States,* 363 F.2d 81 (CA 5 1966).

Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. *In re Hugh B. Powell, supra,* at 1359-1360; *In re Donald Hageman,* 42 A.D. 531, 539-540 (1983).

Because repondent was insolvent on September 30, 1984 and November 8, 1984, it is clear that he failed to meet the financial requirements of the Act. (7 U.S.C. § 204).

SANCTION

Respondent does not contest the factual allegations of the complaint. His sole argument is directed to the proposed sanction sought by the complainant. The complainant requests that respondent be ordered to cease and desist from the practices alleged and that he be suspended for a period of two years and thereafter until he demonstrates his insolvency.

Complainant urges at page 6 of its brief:

> In 1976, Congress recognized the importance of assuring livestock producers prompt payment for the livestock they sell by amending the Packers and Stockyards Act to include section 409 (7 U.S.C. § 228b). This section, which embodies the prompt payment provisions, was enacted to insure financial integrity in the livestock industry and to prevent economic disaster to livestock sellers (Tr. 10). So crucial is the requirement of prompt payment to the financial stability of the livestock industry, a cash basis industry, that Congress uniformly imposed it on all persons subject to the Act's jurisdiction.
>
> The testimony at the oral hearing was unequivocal and extensive that due to the congressional mandate set forth above, the Packers and Stockyards Administration considers violation of the prompt payment provisions of section 409 to be very serious (Tr. 12, 13). Mr. Brinckmeyer testified that these practices are damaging to the individual market agency, dealer or producer who does not receive timely payment, and damaging to the industry as a whole. (Tr. 11).

Further, the Judicial Officer has held repeatedly that it is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department. This policy has been adopted in order to serve as an effective deterrent to the respondent as well as to other potential violators. *In re Braxton M. Worsley*, 33 A.D. 1547, 1556-1561 (1974). The Judicial Officer has also stated that the recommendation of the administrative officials with respect to the sanction is to be given great weight since they administer the program on a daily basis and are in the best position for observing whether the sanctions imposed serve as an effective deterrent to future violations by respondents and others. *In re Worsley, supra,* at 1568.

In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALJ recognized the "enormity of the violations" (Initial Decision at 12), which "clearly warranted" the 2-year suspension order requested by complainant (Initial Decision at 11). Nonetheless, he held all but 30 days of the suspension period in abeyance for the following reasons (Initial Decision at 11-13):

> In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances. At the same time, some consideration should be given to respondent's plea that an order be formulated permitting respondent to continue in the livestock industry with the safeguards that are presently in place. This I believe is possible within the framework of the sanction proposed by complainant.
>
> A modification appears appropriate for several reasons. Respondent was not subject to prior suspensions nor was there any indication of an intent to defraud his creditors. His faults lay in his failure to establish good accounting practices and blind reliance on a credit arrangement with his bank. These failings appear to be remedied through his present arrangement with his employer, Elden Ginn (Findings 13 and 14, and respondent's Exhibit 1). Further, under such arrangement, respondent's creditors receive a token repayment of the indebtedness. (Findings 14, 15). While such payment is no defense to the violations of the Act

credit.[2] He explained that he bought animals on a live weight basis, e.g., paying $500 for an animal, and sold it on a dressed weight basis. He would call the packer on a given day and the packer would tell him what price would be paid for choice cattle delivered at the plant the following day. Respondent would then purchase the livestock himself (or through the 15 buyers purchasing livestock for him on a commission basis) on a live weight basis, and sell it on a grade and yield basis. If he or the other buyers estimated incorrectly the grade that would be determined after slaughter or the number of dressed weight pounds that would be produced from the livestock, respondent would likely lose money on the transaction. Since respondent lost about $700,000 from his grade and yield transactions, either he and his buyers were very inept at buying livestock that would be profitable at the price being paid by the packer, or he was taking too much profit from the business. (For our purposes, it makes no difference which explanation is correct.)

Although respondent was admittedly a very poor bookkeeper, and kept no accounts receivable records, he took all of his records to his bookkeeper once a month. No matter how poor respondent's bookkeeping system was, it would not be possible for him to be short $700,000 without knowing that he was operating in the red. Accordingly, I infer that respondent knew for a considerable period of time that he was operating in a manner that exposed the persons selling livestock to him to great risk.[3] *Cf. Zwick* v. *Freeman*, 373 F.2nd 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967), in which the court said with respect to a failure to pay case under the Perishable Agricultural Commodities Act:

> As there was a series of 295 transactions which occurred over a period of several months and which involved a deficit in excess of a quarter of a million dollars, it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clear-

[2] The bank's action in withdrawing respondent's line of credit did not cause his loss of at least $700,000, but merely exposed his insolvent condition.

[3] Respondent was not asked whether he knew that he had been operating in the red for a considerable period of time. He testified that he assumed that the bank would continue to honor overdrafts, but, as stated above, he was depositing enough money into his checking account from his livestock sales so that his account was overdrawn on only one day during August and September 1984, even though he was at least $700,000 in the red at the time.

er examples of "flagrant" violations of the statute than were exemplified by petitioner's conduct.

If, on the other hand, respondent were to contend that he w totally oblivious to the fact that he was operating heavily in t red, when, in fact, he was short approximately $700,000 in his liv stock business, that would be such reckless conduct that it wou demonstrate a total lack of regard for the legislative requiremen that he pay promptly and in full for his livestock purchases.

Hence under any view of the situation, respondent's failures pay for over $700,000 worth of livestock constitute flagrant viol tions of the Act warranting a most severe sanction.

It is the policy of this Department to impose severe sanctions fo serious or repeated violations of any of the regulatory programs a ministered by the Department to serve as an effective deterrer not only to the respondents, but also to other potential violator This policy has been followed in all of the Department's discipl nary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set fort at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric Dec. 1547, 1556-71 (1974),[4] which is set forth as an Appendix to thi decision.[5] The Department's sanction policy is also discussed a length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

[4] The Department's severe sanction policy did not originate with *Worsley*, but rather, was mentioned briefly in the first decision issued by the present Judicial Of ficer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed i numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 58 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

[5] Severe sanctions issued pursuant to the Department's severe sanction polic were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd pe curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979) *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 318, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric.

Continued

Respondent's failure to pay for about $700,000 worth of livestock fully justifies the 2-year suspension order requested by complainant. It should be noted that there has been a drastic change in complainant's sanction policy with respect to failure to pay violations in recent years. For many years, a person who deprived a livestock seller of 1% of the value of his livestock by false weighing would be given a more severe sanction than a person who deprived the livestock seller of 100% of the value of his livestock by failing to pay for the livestock. In the latter case, a 30-day suspension order was typical. (I inherited that policy and did not change it during the period I was administrator of the Packers and Stockyards Act regulatory program.)

I suggested a drastic change in that policy in *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978). In that case, livestock sellers lost over half a million dollars because respondents took money from their livestock business, which was needed to pay sellers, and lost it gambling on the commodity futures market (37 Agric. Dec. at 550). Complainant recommended the usual 30-day "slap on the wrist" suspension order, which was imposed by the ALJ. When *respondent* appealed, I *sua sponte* raised the issue as to whether the sanction should be increased on appeal, and suggested in an order requesting additional briefs that a 5-year suspension order seemed appropriate. In imposing a 60-day suspension order in that case, it is stated (37 Agric. Dec. at 550-51):

> Just last year Congress indicated its concern that livestock producers be paid for their livestock by the enactment of amendments to the Packers and Stockyards Act which impose payment requirements even more stringent than those previously imposed by the regulations issued under the Act (Public Law 94-110, 94th Cong., 2nd Sess.; 90 Stat. 1249). In the House Report on the bill relating to these amendments, it is stated (H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p. 5; see, also, Sen. Rep. No. 94-932, 94th Cong., 2nd Sess., pp. 5-6):
>
> > USDA figures show that in 1973 some $31 billion worth of livestock and $4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm

Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

> income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

In two recent cases involving failure to pay for about $766,000.00 and $3.2 million dollars worth of livestock, respectively (*In re Robert L. Benefiel,* 32 Agr Dec 1684 (1973); *In re James L. Heller,* 34 Agr Dec 1563 (1975)), respondents were suspended for five years. Although these cases are not weighty precedents because one is a consent case and the other a default case, they show, nonetheless, that a 5-year suspension order is at least regarded as appropriate in some failure to pay cases. I believe that the respondent's failure to pay over half a million dollars in the present case warrants a similar 5-year suspension order, particularly since the respondents took the money from their successful livestock business to finance their gambling ventures.

Under a similar regulatory program administered by the Department involving perishable agricultural commodities, a violator's license is routinely revoked for failing to pay a significant amount of money for produce, even where such failure is because of legitimate business losses. See, *e.g., In re Reese Sales Company,* 28 Agr Dec 1150 (1969), affirmed *sub nom. Reese Sales Company* v. *Hardin,* 458 F.2d 183

(C.A. 9); *In re Sam Leo Catanzaro*, 35 Agr Dec 26 (1976), [*aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977)].[6] A revoked licensee may not apply for a new license for two years. 7 U.S.C. 499d(b).

[6] *Accord In re B.G. Sales Co.*, 44 Agric. Dec. ____ (Oct. 9, 1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983) (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 4 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtor's to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171, (1982) (nonpayment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent $776,459.25), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *printed in* 41 Agric. Dec. 88 (1982); *In re John Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (9th Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over $130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

> Although I believe the violations in this case warrant a 5-year suspension order to serve as an effective deterrent to future similar violations, the complainant, in the oral argument before the Judicial Officer, recommended only a 60-day suspension order. Since it is the policy of the Judicial Officer "never to increase the sanction recommended by the administrative officials" (see Appendix, p. 21a), a 60-day suspension order will be issued rather than a 5-year suspension order.

Subsequent to the decision in *Mid-States,* just quoted, the Judicial Officer overruled that portion of the Department's sanction policy which precluded him from imposing a sanction greater than that recommended by the administrative officials (*In re Rowland,* 40 Agric. Dec. 1934, 1952 (1981), *aff'd,* 713 F.2d 179 (6th Cir. 1983)). Accordingly, if *Mid-States* were to be decided today, a 5-year suspension order would be issued.

The ALJ felt that it would be desirable to permit respondent to continue in the livestock industry with the safeguards that are presently in place. I disagree! It is not desirable to permit respondent to continue in the livestock industry since that would seriously undercut the deterrent value of the administrative sanction imposed in this case. It would encourage respondent and others to act in a similar irresponsible manner in the future, greatly endangering livestock sellers.

The ALJ also indicated that under the proposed arrangement to permit respondent to remain in the livestock business during all but 30 days of the 2-year suspension period, respondent's creditors could receive a "token" repayment of the indebtedness. However, that argument has routinely been rejected in determining sanctions imposed by this Department. It has consistently been held that any hardship to the respondent's creditors, customers, commu-

" employees which might result from a suspension order is in determining the sanction since the national in-

d competitive conditions in the livestock

ils over the local interests that might be

lost as a result of a suspension order.[7]

[7] *In re Blackfoot Livestock Comm'n Co.,* 45 Agric. Dec. ___ (Mar. 7, 1986), *appeal docketed,* No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Gilardi Truck & Transp., Inc.,* 43 Agric. Dec. ___ (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.,* 42 Agric. Dec. 151, 1172 (1983); *In re Bananas, Inc.,* 42 Agric. Dec. 588, 606 (1983); *In re Melvin Greene Produce Co.,* 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd,* 728 F.2d 347 (6th Cir. 1984); *In re Powell,* 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.,* 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher,* 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z.*

Continued

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Richard N. Garver, his agents and employees, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for 2 years and thereafter until such time as he demonstrates that he is no longer insolvent. When the respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after expiration of the 2-year period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The suspension provisions shall become effective on the 30th day after service on respondent.

APPENDIX

Excerpt from *In re Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

Lancaster Stock Yards, Inc., 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

In re: LANDMARK BEEF PROCESSORS, INC., JOHN M. BURBANK, ALAN SILVERBERG, RONALD HILLMAN, and CHAIM TREIBATCH, P&S Docket No. 6174. Decided June 20, 1986.

Failure to pay—inaccurate records—Civil Penalty—Consent.

Jory Hochberg, for complainant.
Harrison W. Hertzberg, Los Angeles, CA, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO CHAIM TREIBATCH

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, and a subsequent Amended Complaint and Notice of Hearing alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Chaim Treibatch admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, neither admits nor denies liability for the actions and practices of Landmark Beef Processors, Inc., waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Chaim Treibatch, hereinafter referred to as respondent Treibatch, is an individual whose mailing address is 17211 Rancho Street, Encino, California 91316.

2. Respondent Treibatch is, and at all times material herein was:

(a) Chief Financial Officer of Landmark Beef Processors and a principle owner of the stock of Landmark Management Company, a holding company which owns 100% of the stock of the corporate respondent;

(b) With John M. Burbank, Ronald Hillman and Alan Silverberg, responsible for the management, direction and control of the policies and practices of respondent Landmark Beef Processors; and

3. Respondent Treibatch consents to the jurisdiction of the Secretary to enter this decision.

CONCLUSIONS

Respondent Chaim Treibatch having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Chaim Treibatch, his agents and employees, individually or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, for meat and meat food products purchased;

2. Preparing and using any false, misleading, incorrect or incomplete financial statements or inventory reports for the purpose of inducing suppliers and vendors of meat and meat food products to sell or otherwise transfer such products to respondents.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Packers and Stockyards Act and the regulations, including, but not limited to: (1) invoices and other accountings which disclose all purchases and sales of meat or meat food products; (2) records of all receipts and disbursements; (3) a general ledger of accounts disclosing respondent's assets, liabilities, income, expenses and net worth; and (4) an accurate and current inventory record.

Respondent shall keep and maintain, and shall not destroy or otherwise dispose of, any purchase invoices, sales invoices, inventory records, or similar accounts and records documenting the purchase and sale of meat or meat food products for a minimum period of two years. In addition, respondent shall strictly comply with the provisions of section 203.4 of the statements of general policy (9 CFR § 203.4).

Respondent Chaim Treibatch is hereby assessed a civil penalty in the amount of Twenty Thousand Dollars ($20,000.00), payable pursuant to the terms of that certain Understanding With Respect to Civil Penalty and Payment Terms, concurrently executed herewith.

The provisions of this order shall become effective on the first day after service of this decision on respondent Chaim Treibatch.

Copies hereof shall be served upon the parties.

In re: KLEMME CATTLE CO., INC., P&S Docket No. 6455. Decided February 24, 1986.

Maintain bond—Civil Penalty.

Roberta Swartzendruber, for complainant.
Kent O. Hyde, Springfield, MO, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary action brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C., section 181, et seq.), wherein the Respondent is charged with violation thereof by reason of operating as a dealer, buying and selling livestock in commerce, without having and maintaining an adequate bond, or its equivalent, as required by the Act and the regulations promulgated thereunder, by the Secretary of Agriculture (9 CFR section 201.1 et seq.).

The Complaint was filed on November 29, 1984, to which the Respondent filed an Answer on December 26, 1984.

An oral hearing was held herein on July 17, 1985, in Springfield, Missouri, before Administrative Law Judge Dorothea A. Baker. Appearing as counsel for the Complainant was Roberta Swartzendruber, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondent was represented by Kent O. Hyde, Esquire, Harrison, Tucker & Geisler, 1121 S. Glenstone, Missouri 65804. Pursuant to pleadings for the reopening of the briefing period, the last brief herein was filed February 3, 1986, and the case was referred to the Administrative Law Judge on February 10, 1986.

naterially differ as to the Findings of Fact, implications flowing therefrom.

OF FACT

er referred to as Re-
s a corporation with its principal place of business located at Walnut Grove, Missouri. Its business mailing address is Route 2, Walnut Grove, Missouri 65770.

2. Respondent Klemme Cattle, at all times material herein, was engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

3. Respondent Klemme Cattle, at all times material herein, was registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce, and as a market agency buying livestock in commerce on a commission basis. (Complaint, Paragraph I(b)(2); CX 1)

4. Respondent Klemme Cattle is solely owned by Lem and Yvonne Klemme and their four children. It is directed, controlled and managed by Lem and Yvonne Klemme. (TR 57, 58, 61)

5. Respondent Klemme Cattle was sent, on September 24, 1984, and received, on September 26, 1984, formal notice from the Packers and Stockyards Administration that its bond to secure the performance of its livestock operations under the Act would expire on October 24, 1984. The notice further stated that if a new bond or its equivalent was not secured, all livestock operations for which bonding was required would have to be discontinued as of October 24, 1984, or respondent Klemme Cattle would be in violation of the Act and regulations. (CX 2, 3, 4; TR 10, 11, 14, 15)

6. Despite this notification, respondent Klemme Cattle continued in business as a dealer, engaging in livestock operations for which bonding was required under the Act without maintaining either a bond or its equivalent. (CX 6, 7, 8, 9, 10, 11; TR 11, 12, 59, 65, 70)

7. Respondent Klemme Cattle continued in violation of the Act, engaging in livestock operations for which bonding was required without having in effect a bond or its equivalent from October 24, 1984, through March 27, 1985. (CX 2, 3, 4, 5; TR 10, 11, 27, 31, 59, 65)

8. In the five month period from October 24, 1984, through March 27, 1985, during which no bond or its equivalent was in effect, Respondent Klemme Cattle purchased and sold hundreds of thousands of dollars worth of livestock in transactions for which bonding was required under the Act.

9. Except for the period alleged in the Complaint, Respondent has always maintained a Bond and abided by the Packers and Stockyards Rules and Regulations.

10. Respondent's Livestock Bond was terminated on or about October 24, 1984, because the company which provided Respondent with a Bond discontinued writing Livestock Bonds. Respondent immediately sought a new company to write a Bond, and although Respondent was diligent in its efforts to obtain a new Bond, five months expired in the interim.

11. The record is abundant with evidence that Respondent, by and through its agent, employee, and part owner, made timely attempts to obtain a new Bond.

CONCLUSIONS

The Respondent herein, during the period from October 24, 1984, through March 27, 1985, operated without a Bond or Bond equivalent in disregard of Complainant's Notice that such operations would be in violation of the Act and the regulations.

On September 24, 1984, the Complainant notified Respondent that its Bond would terminate on October 24, 1984. The Notice further instructed Respondent that if a new Bond or its equivalent was not obtained by the close of business on October 24, 1984, all livestock operations for which bonding is required under the Act had to be discontinued. Said Notice was received by the Respondent corporation.

For a period of five months from October 24, 1984, through March 27, 1985, the Respondent operated without a Bond or its equivalent. The testimony adduced at the oral hearing constitutes admissions that during the cited time period, the Respondent was in continuous violation of the Act.

During this five-month period, Respondent purchased and sold hundreds of thousands of dollars worth of livestock in unbonded transactions. In the fourth quarter of 1984 alone, Respondent, although bonded for only twenty-four days of that three-month period, purchased livestock totaling $401,968.89 while leaving a total livestock inventory for 1984 of only $22,794.44.

The requirement that a Bond or its equivalent be maintained by every dealer is a requirement imposed by the Act and the regulations (7 U.S.C. section 204; 9 CFR section 201.29, 201.30). It has been held that operation without a Bond or its equivalent is a violation of section 312(a) of the Act (7 U.S.C. section 213(a)) as an "unfair, unjustly, discriminatory, or deceptive practice or device." See *In re: Martin*, 8 A.D. 1247 (1949); *In re: White*, 23 A.D. 1104 (1964); and *In re: Centreville Livestock Auction Inc.*, 31 A.D. 765 (1972).

The Respondent does not substantially dispute the Findings of Fact in this matter, but rather maintains that before there can be finding of wilfulness in an action brought under the Packers and Stockyards Act, there must be a finding that the Respondent committed an "intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." Citing *Capital Packing Company* v. *United States*, 350 F.2d 67 (10th Circuit, 1965).

With respect to this argument of the Respondent, it will be noted initially that the Respondent did, in this case, receive a "warning letter." Moreover, the contention of the Respondent that it should not be found to have "willfully" violated the Act cannot be main-

tained in view of the precedent followed by the Department of Agriculture.

As set forth by the Complainant in its Brief, the term "willful" has many meanings, in connection with regulatory statutes such as this one. The precedent followed by the Department of Agriculture is that a prohibited action is willful if done intentionally or with careless disregard of statutory requirements. *In re: Speight*, 33 A.D. 280 (1974); *In re: Miller*, 33 A.D. 53 (1974), appeal denied, 498 F.2d 1088 (5th Circuit 1974); *In re: Rayville Livestock Inc.*, 30 A.D. 886 (1971); and *Goodman* v. *Benson*, 286 F.2d 896 (7th Circuit 1961).

Intentionally or negligently doing a prohibited act is willful under a regulatory statute such as the one here involved. This broad definition of willfulness has been adopted in precedent cases. A most recent statement of the Department's Judicial Officer is set forth in the excerpt, *infra*, from *Gerald F. Upton, d/b/a Degraff Livestock Sales, Respondent*, Docket No. P. & S. 6196, December 4, 1985:

"As stated in *In re Farrow*, 42 Agric. Dec.—(September 21, 1983) (slip op. at 54-55):

> Respondents would have to be incredibly naive not to know that their agreement violated the comprehensive Packers and Stockyards Act regulatory program. I do not believe that they are incredibly naive. But in any event, a violation is wilful, so that a suspension order can be issued (5 U.S.C. § 558(c)), if a person (i) intentionally does an act which is prohibited, irrespective of evil motive, or reliance on erroneous advice, or (ii) acts with careless disregard of statutory requirements. *In re Shatkin*, 34 Agric. Dec. 296, 298-314 (1975), and cases cited therein. And *see Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-87 (1973). (Footnote omitted)

The Court stated in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973):

> > The Secretary may suspend "for a reasonable specified period" and registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to

impose it to deter repeated violations of the Act, whether intentional or negligent."

In addition, the *Upton* case went on to state:

"Suspension orders have routinely been upheld where a finding of willfulness was made by the Department without a finding that the respondent knew that his conduct was unlawful. For example, in *Goodman* v. *Benson,* 286 F.2d 896,900 (7th Cir. 1961), the court upheld a suspension order, stating:

We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. *v.* Benson, 3 Cir., 278 F.2d 606, 609.

Similarly, in *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 609 (3d Cir. 1960), the court upheld a suspension order, stating:

Nor can we subscribe to the proposition that the test of willfulness in this context is to be evil purpose of criminal intent, for this is not a criminal statute."

The Respondent's owners and managers freely admitted during the oral hearing that the Respondent corporation had operated in violation of the Act for months after Notice, and it was further admitted that they had full knowledge and understanding of the Act's provisions and requirements, having been in the cattle business for more than 20 years. Such operation after Notice has consistently been held to be willful.

The Complainant has established on the record the reason for its requested sanction of a $1,500.00 civil penalty to be assessed against the Respondent for its willful violation of the Packers and Stockyards Act and regulations. Accordingly, such sanction is hereby imposed.

The Respondent seeks the imposition of a penalty of no more than $100.00. However, the facts and record of this case do not show valid reason for such a low penalty, and, is not consistent with the record evidence. The Complainant's sanction policy and guidelines were provided by Complainant's witness, Mr. Jack Brinckmeyer. This testimony is found at pages 84 and 85 of the transcript:

Q. Why is that you think an appropriate sanction is $1,500.00?

A. It is basically based on our present guidelines that we use in determining sanction for a failure to provide bond coverage. July, a year ago, when the bonding requirements were increased to $10,000.00 minimum, we changed our basic determination to 5 per cent of the amount of the bond that was required at the time it was terminated, plus the period of time that the person operated without bond coverage is determined in the civil penalty that is included.

Prior to that we have been using 10 per cent because of the increase in the minimum bond and requirements under 303, we tried to equate those to be in a fairly equal position.

* * * * * * *

Q. Do you feel, Mr. Brinckmeyer, in your opinion as an employee of the Packers and Stockyards Administration, do you feel that the penalty of $1,500.00 is what is necessary to basically assure the Department that Mr. Klemme won't again operate without a bond?

A. That's part of it. We feel that the penalty is also to indicate to other people that would be inclined to violate the Act, that they should stay in compliance. I will have to say that we have started and are continuing to increase our sanctions, not only on civil penalties but on suspensions as well, to a point to where we have more voluntary compliance, if you want to call it that. I feel this penalty is in an area that we need at the present time to insure compliance by respondent, as well as other people who would be inclined in engage in the same type of violations.

The Department's deciding official, the Judicial Officer, has stated many times what is set forth in the 1974 decision of: *In re: Worsley*, 33 A.D. 1547, that it is the policy of the Department to impose severe sanctions upon Respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department.

The record evidence herein firmly establishes the seriousness of Respondent's violations. For months, Respondent Klemme Cattle engaged in livestock transactions totalling hundreds of thousands of dollars while offering the industry no surety protection in event of its failure to pay those with whom it engaged in business.

Accordingly, the following Order is appropriate, and, it is so issued.

ORDER

Respondent Klemme Cattle Company, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a dealer or market agency subject to the Act, shall cease and desist from engaging in business subject to the Act without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. section 213(b)), Respondent is assessed a civil penalty of One Thousand Five Hundred Dollars ($1,500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Roberta Swartzendruber, Esquire, Office of the General Counsel, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400.

The provisions of this Order shall become effective Thirty-five days after service thereof unless appealed by a party hereto within Thirty Days after service, all as more fully set forth in the Rules of Practice and Procedure, 7 CFR 1.131, *et seq,* 1.145(a) and 1.142(c).

Copies of this Decision shall be served upon the parties.

[Decision and Order became final on June 21, 1986.—Ed.]

In re: B. C. UMBERGER, P&S Docket No. 6691. Decided June 23, 1986.

Cease and desist failure to pay for purchases—Suspension—Consent.

Andrew Stanton, for complainant.
James A. Boyd, Wytheville, VA, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. B. C. Umberger, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 265, Wytheville, Virginia 24382.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent B. C. Umberger, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of four weeks.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: FRED COCHRAN and DALE COCHRAN, P&S Docket No. 6693. Decided June 23, 1986.

Insufficient funds—failure to pay—Suspension—Consent.

Roberta Swartzendruber, for complainant.
Edward F. Rate, Iowa City, IA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Fred Cochran and Dale Cochran, hereinafter referred to as the respondents, are individuals whose principal places of business are located in North Liberty, Iowa, and Coralville, Iowa, and whose business mailing address is R.R. 2, North Liberty, Iowa 52317.

2. Respondents, at all times material herein, were:

(a) Engaged in the business of buying livestock in commerce for their own accounts; and

(b) Registered with the Secretary of Agriculture as dealers to buy and sell livestock in commerce for their own accounts.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Fred Cochran and Dale Cochran, their agents and employees, directly or through any corporate or other device, in

connection with their business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondents Fred Cochran and Dale Cochran are suspended as registrants under the Act for a period of five years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of six months for respondent Fred Cochran and after two years for respondent Dale Cochran upon demonstration by respondents that all unpaid livestock sellers have been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondents' salaried employment by another registrant after the expiration of a six month suspension for Fred Cochran and a two year suspension for Dale Cochran.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: RAYMOND HENSLEY, P&S Docket No. 6534. Decided June 26, 1986.

Bonding required—Civil Penalty—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Raymond Hensley, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 199, Collins, Missouri 64738.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account, and a market agency buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Raymond Hensley, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

The respondent is assessed a civil penalty, the dollar amount of which shall be five percent (5%) of the respondent's required amount of bond coverage, not to exceed Two Thousand Seven Hundred and Fifty Dollars ($2,750.00). The amount of required bond coverage is dependent on the amount of livestock purchased during the respondent's business year as set forth in Packers and Stock-

yards Administration regulations at 9 CFR § 201.30. The respondent agrees to furnish the dollar amount of all his livestock purchases from January 1, 1985, through March 31, 1986, to the Packers and Stockyards Administration's Kansas City, Missouri, Regional Office at 828 Livestock Exchange Building, Kansas City, Missouri 64102.

When the livestock purchase figures are received and the amount of the respondent's required bond is determined, the dollar amount of the civil penalty shall be assessed as set forth herein and the respondent shall be immediately notified by the Regional Office of the required dollar amount for his bond and the amount of his assessed penalty.

Should this dollar amount of livestock purchases *NOT* be received by the Regional Office within the 30 day period following the date this decision is signed by the administrative law judge, the maximum civil penalty of Two Thousand Seven Hundred and Fifty Dollars ($2,750.00) is hereby assessed against the respondent.

Upon the effective date of this order, respondent Raymond Hensley shall make a payment of Two Hundred and Fifty Dollars ($250.00) toward the total civil penalty to be assessed, such payment to be made by certified check payable to the Treasurer of the United States clearly marked with the case docket number and sent to Roberta Swartzendruber, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2446, South Building, Washington, D.C. 20250-1400. Payments in the sum of Two Hundred Fifty Dollars ($250.00) per month shall be made in like manner by respondent on the remaining balance of the civil penalty until paid in full. These payments are to commence on the first day of the month following respondent Hensley's notification of the amount of civil penalty assessed.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: GILES AND STRATTON AUCTION, INC., a corporation, d/b/a LIVESTOCK PRODUCERS, FLOYD GILES, an individual, and RONNIE STRATTON , an individual, P&S Docket No. 6660. Decided June 26, 1986.

Insolvent—Civil Penalty—Suspended—Consent.

Roberta Swartzendruber, for complainant.
Michael Epley, Magnolia, AR, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Giles and Stratton Auction, Inc., doing business as Livestock Producers, hereinafter referred to as the corporate respondent, is a Louisiana corporation whose mailing address is R.R. 1, Box 666, Bossier City, Louisiana 71112.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating Livestock Producers stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis and as a dealer buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and as a dealer to buy and sell livestock in commerce for its own account.

3. Floyd Giles and Ronnie Stratton, hereinafter referred to as individual respondents Giles and Stratton, are sole owners of the corporate respondent. Individual respondent Giles is president and individual respondent Stratton is vice president of the corporate respondent.

4. Individual respondents Giles and Stratton direct, manage and control the business activities of corporate respondent.

5. The individual respondents Giles and Stratton are market agencies and dealers within the meaning of those terms as defined in the Act and subject to the provisions of the Act.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Giles and Stratton Auction, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Floyd Giles and Ronnie Stratton, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42 of the regulations, amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Failing to otherwise maintain and use properly their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

5. Consigning livestock to any stockyard for sale under false or fictitious names;

6. Preparing buyer's bills which fail to disclose the full, true and correct names of the buyers of consigned livestock;

7. Permitting its auctioneer or other key employees to purchase livestock from consignments for speculative resale or to fill orders; and

8. Selling consigned livestock to any owner, officer, agent, employee, or any such person having an ownership or financial interest in the market without disclosing the name of the buyer and the nature of the relationship existing between the market agency and the buyer on the account of sale issued to the consignor. Further, such disclosure shall be publicly announced at the time of sale.

Respondents Giles and Stratton Auction, Inc., and Floyd Giles are suspended as registrants under the Act for a period of seven (7) days and thereafter until they demonstrate that they are no longer insovlent and that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that they are no longer insolvent and that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the seven (7) day period.

Respondent Stratton is prohibited for a period of seven (7) days from engaging in business or operating subject to the Act as a dealer and/or market agency.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are hereby assessed a civil penalty in the amount of seventeen thousand dollars ($17,000.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: TERRY KREWSON, BOBBIE KREWSON, D. E. KREWSON, and LICKING LIVESTOCK AUCTION COMPANY, INC., P&S Docket No. 6702. Decided June 26, 1986.

Failure to maintain accounts—failure to pay promptly—failure to pay full purchase price—suspended—must eliminate deficits—meet bonding requirements—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

ling was instituted under the Packers and Stockyards
§ 181 *et seq.*) by a complaint filed by the Administra-

tor, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in Part I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Terry Krewson and Bobbie Krewson were, at all times material herein, partners doing business as Licking Livestock Auction Co., and having their principal place of business at Licking, Missouri. Respondents' business address is P. O. Box 299, Licking, Missouri 65542.

2. Respondents Terry Krewson and Bobbie Krewson were, at all times material herein:

(a) Engaged in the business of conducting and operating the Licking Livestock Auction Co. stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

3. In addition to his partnership activities set forth above, respondent Terry Krewson, was, at all times material herein:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account;

4. On April 5, 1985, Licking Livestock Auction Co. was incorporated under the laws of the State of Missouri as Licking Livestock Auction Company, Inc.;

5. Licking Livestock Auction Company, Inc., hereinafter referred to as corporate respondent, succeeded respondents Terry and Bobbie Krewson doing business as Licking Livestock Auction Co. in the conduct and operation of Licking Livestock Auction Company stockyard and is engaged in business as a market agency selling

livestock on a commission basis, but is not so registered with the Secretary.

6. Respondent Terry Krewson is responsible for the day-to-day management of the corporate respondent.

7. D. E. Krewson, father of respondent Terry Krewson, at all times material herein was:

(a) Owner, in combination with his wife, of all corporate respondent's stock;

(b) President of the corporate respondent; and

(c) Responsible, in combination with respondent Terry Krewson, for the direction, management and control of all business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Corporate respondent Licking Livestock Auction Company, Inc., its officers, directors, agents, employees, successors and assigns, and individual respondents Terry Krewson, Bobbie Krewson, and D.E. Krewson, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business as a dealer or market agency while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed by section 201.42 of the regulations, amounts equal to the proceeds due consignors for livestock purchased by respondents for market support, and amounts equal to the outstanding proceeds receivable from the sale of consigned livestock;

3. Failing to otherwise maintain and use properly their Custodial account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of net proceeds to the consignors and shippers of livestock;

5. Consigning livestock to any stockyard for sale under false or fictitious names;

6. Selling consigned livestock under false or fictitious names;

7. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account(s) upon which such checks are drawn to pay such checks when presented;

8. Failing to pay, when due, the full purchase price of livestock;

9. Failing to pay the full purchase price of livestock; and

10. Engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondents Terry and Bobbie Krewson are suspended as registrants under the Act for a period of twenty one (21) days and thereafter until they demonstrate that they are no longer insolvent and that the deficit in their custodial account has been eliminated. When respondents demonstrate that they are no longer insolvent and that the shortage in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the twenty one (21) day period.

Licking Livestock Auction Company, Inc., and respondent D. E. Krewson are prohibited for a period of twenty one (21) days from engaging in business or operating subject to the Act as a dealer and/or market agency selling livestock on a commission basis and thereafter until they demonstrate that Licking Livestock Auction Company, Inc., is no longer insolvent, that the deficit in its custodial account has been eliminated, and that it is in compliance with the bonding requirements under the Act and the regulations. When respondents demonstrate that Licking Livestock Auction Company, Inc., is no longer insolvent, that the shortage in its custodial account has been eliminated, and that it is in full compliance with the bonding requirements under the Act and the regulations, a supplemental order will be issued in this proceeding terminating this prohibition after the expiration of the twenty one (21) day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK and GEORGE BITZ, P&S Docket No. 6678. Decided June 30, 1986.

Custodial account misuse—misuse of funds—Suspended—Consent.

Jory Hochburg, for complainant.
Joseph A. Vogel, Jr., Mandan, ND, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO DONALD A. HAUCK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Donald Hauck admits the jurisdictional allegations in paragraph I of the Complaint as those allegations pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Donald A. Hauck, hereinafter referred to as respondent Hauck, is an individual whose business address is P. O. Box 1914, Minot, North Dakota.

2. Respondent Hauck, at all times material herein was:

(a) President of respondent Napoleon;

(b) Owner of 51 per cent of the outstanding stock issued by respondent Napoleon;

(c) Responsible for the direction, management and control of respondent Napoleon;

(d) Engaged in the business of conducting and operating the Napoleon Livestock Auction, Inc. stockyard, a posted stockyard subject to the Act;

(e) Engaged in the business of selling livestock on a commission basis at the Napoleon stockyard, buying livestock in commerce on a commission basis, and buying and selling livestock in commerce for his own account; and

(f) A dealer and a market agency, within the meaning and subject to the provisions of the Act.

3. Since September 6, 1985, respondent Hauck has been registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce at the Northern Livestock Exchange, a posted stockyard subject to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Hauck, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain his Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in his Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of his own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or for the payment of amounts due the respondents for lawful marketing charges;

4. Reducing or eliminating the selling commission required by the stockyard's approved tariff for consignments of livestock to the stockyard;

5. Providing free or reduced transportation to consignors for livestock consigned to the stockyard for sale; and

6. Paying all or a portion of the lodging costs or other expenses incurred by buyers attending sales held by the stockyard.

Respondent Hauck is suspended from operating as a dealer or a market agency subject to the Act and is prohibited from acting as the agent or employee of a dealer or a market agency subject to the Act for a period of 21 days.

The provisions of this Order shall become effective upon filing.

Copies of this decision shall be served upon the parties.

In re: NAPOLEON LIVESTOCK AUCTION, INC., DONALD A. HAUCK and GEORGE BITZ, P&S Docket No. 6678. Decided June 30, 1986.

Custodial accounts—deposit proceeds—misuse of funds—suspension—prohibition as dealer—Consent.

Jory Hochberg, for complainant.
Joseph A. Vogel, Jr., Mandan, ND, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RESPONDENTS NAPOLEON LIVESTOCK AUCTION, INC., AND GEORGE BITZ

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Napoleon Livestock Auction, Inc., and George Bitz admit the jurisdictional allegations in paragraph I of the complaint as those allegations pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Napoleon Livestock Auction, Inc., hereinafter referred to as respondent Napoleon, is a corporation organized and existing under the laws of the State of North Dakota. Its business mailing address is P. O. Box 3, Napoleon, North Dakota 58561.

2. Respondent Napoleon is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Napoleon Livestock Auction, Inc. stockyard, a posted stockyard subject to the Act, hereinafter referred to as the stockyard; and

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, buying livestock on a commission basis in commerce, and buying and selling livestock in commerce for its own account.

3. Respondent Napoleon is, and at all times material herein was, registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

4. George Bitz, hereinafter referred to as respondent Bitz, is an individual whose business mailing address is P. O. Box 3, Napoleon, North Dakota 58561.

5. Respondent Bitz is, and at all times material herein was:

(a) A corporate officer of respondent Napoleon;

(b) Owner of at least 49 percent of the outstanding stock issued by respondent Napoleon;

(c) Responsible for the direction, management and control of respondent Napoleon;

(d) Engaged in the business of conducting and operating the stockyard;

(e) Engaged in the business of selling livestock on a commission basis at the stockyard, buying livestock on a commission basis in commerce, and buying and selling livestock in a commerce for his own account; and

(f) A dealer and a market agency, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondents Napoleon and Bitz having admitted the jurisdictional facts as they pertain to them and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Napoleon, its officers, directors, employees, agents, successors and assigns, and respondent Bitz, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)) amounts due from the sale of consigned livestock;

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or for the payment of amounts due the respondents for lawful marketing charges;

4. Reducing or eliminating the selling commission required by the stockyard's approved tariff for consignments of livestock to the stockyard;

5. Providing free or reduced cost transportation to consignors of livestock to the stockyard for sale; and

6. Paying all or a portion of the lodging costs or other expenses incurred by buyers attending sales held by the stockyard.

Respondent Napoleon is suspended as a registrant subject to the Act and respondent Bitz is prohibited from operating as a dealer or market agency subject tothe Act or acting as an employee or agent of a dealer or a market agency subject to the Act for a period of 21 days and thereafter until such time as they demonstrate that the deficit in their custodial account has been eliminated. When respondents demonstrate that the deficit in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 21-day period.

The provisions of this order shall become effective upon filing of this decision.

Copies of this decision shall be served upon the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: FARMERS LIVESTOCK AUCTION, INC., P&S Docket No. 6266. Decided May 14, 1986.

Suspension modified to terminate—deficit in accounts eliminated.

Mary Hochberg, for complainant.
Gerald Eftink, Kansas City, MO, for respondent.

Decision for John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On November 14, 1985, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of 28 days and thereafter until the deficit in respondent's custodial account was eliminated. The effective date of this suspension was later modified by orders issued on December 11, 1985, and April 15, 1986.

Respondent has now demonstrated that the deficit in its custodial account has been eliminated. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 15, 1986, is modified to terminate after the expi-

ration of the 28 day period of suspension. The order shall remain in full force and effect in all other respects.

In re: BUSHELLE CATTLE COMPANY, INC., P&S Docket No. 6639. Decided May 14, 1986.

Late Appeal denied.

Roberta Swartzendruber, for complainant.
John P. Smith, Park Rapids, MN, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING LATE APPEAL

Respondent's appeal was filed with the Hearing Clerk on April 28, 1986, after it had become final and effective on April 26, 1986. Accordingly, respondent's appeal must be dismissed because it was not timely filed. See *In re Powell,* 44 Agric. Dec. ____ (May 28, 1985), attached as Appendix A.

Even if respondent's appeal had been timely filed, it would have been dismissed because respondent failed to file a timely answer. See *In re Daul,* 45 Agric. Dec. ____ (Mar. 6, 1986), attached as Appendix B.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent's appeal is denied since it was filed after the Administrative Law Judge's decision had become final.

APPENDIX A

In re Powell, 44 Agric. Dec. ____ (May 28, 1985)

APPENDIX B

In re Daul, 45 Agric. Dec. ____ (Mar. 6, 1986)
[Both excerpts omitted.—Ed.]

In re: GARY WESSELS, P&S Docket No. 6423. Decided June 13, 1986.

Suspension terminated—compliance.

Roberta Swartzendruber, for complainant.
Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 29, 1984, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act for a period of 180 days and thereafter until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 29, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In re: RANCHERS AND FARMERS LIVESTOCK AUCTION, INC., and L. KIRBY POWELL, P&S Docket No. 6692. Decided June 23, 1986.

Suspension terminated.

Jory Hochberg, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On May 5, 1986, an order was issued in the above-captioned matter which, *inter alia,* suspended the corporate respondent as a registrant under the Act for a period of 21 days and thereafter until its current liabilities do not exceed its current assets.

Corporate respondent has now demonstrated that its current liabilities do not exceed its current assets. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 5, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: ALLEN H. RIFFEE, P&S Docket No. 6477. Decided June 30, 1986.

Suspension period expired—bonding requirements met.

Stephen Luparello, for complainant.
Arthur Lambiotte, Woodstock, VA, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On December 13, 1985, an order was issued in the above-captioned matter, which, *inter alia,* suspended respondent as a registrant under the Act for a period of four months and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations.

The four month period of suspension has expired and respondent is now in compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 13, 1985, is terminated. The order shall remain in full force and effect in all other respects.

In re: CARTER-KIRCHOFF FEED YARD, INC., and BOB CARTER, P&S Docket No. 6611. Decided June 30, 1986.

Full restitution date established.

Dennis Becker, for complainant.
R. Byron Bass, Jr., Lubbock, TX, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

AMENDMENT OF ORDER

For good cause show, and on agreement of counsel for both parties, that portion of the Order of April 2, 1986, which provides that:

> In accordance with section 312(b) of the Act, the corporate respondent and individual respondent are assessed jointly and severally a civil penalty of one hundred thousand dollars ($100,000.00), with the proviso that the civil penalties will be waived if full restitution is made to the parties named in paragraph II(a) of the complaint within 90 days of the entry of this order.

is amended to provide that full restitution must be made by August 18, 1986.

REPARATION DECISIONS

STANLEY V. GLOVER, *v.* LIMON LIVESTOCK EXCHANGE and MIKE JORGENSEN, P&S Docket No. 6562. Decided June 10, 1986.

Full payment—Complaint dismissed.

Peter V. Train, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

ORDER OF DISMISSAL

Complainant having informed the presiding officer that he has received full payment of his claim, the above-captioned complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

In re: LEO ZEMLISKA, d/b/a PROFESSIONAL FEEDER CONSULTANTS, *v.* GLASGOW LIVESTOCK SALES CO., and ROBERT D. FJELDHEIM, P&S Docket No. 6064. Decided June 20, 1986.

Failure to pay—agency—indemnity for expenses and losses—instructions violated—portion dismissed—reparations.

Thomas Heinz, Presiding Officer.
John L. Davidson, Billings, MT, for complainant.
Robert M. Cook, Norfolk NE, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. § 181 *et seq.*), hereinafter "the Act," begun by a complaint timely filed on February 11, 1982, alleging in substance that respondents failed to reimburse complainant for livestock purchased on order by complainant for respondents. The amount claimed as reparation was $57,016.32. That amount was changed on brief to $41,501.25 plus interest thereon at the rate of 16.5% per annum from November 15, 1983, until paid. A copy of the formal complaint and the investigation report prepared by the Packers and Stockyards Administration of this Department was served on respondents.

Respondents filed a timely answer generally denying the allegations of the complaint. Further, in allegations later abandoned on brief, respondents alleged that the Secretary of Agriculture lacks

jurisdiction over the parties and the subject matter, that the complaint was untimely filed and that complainant has been paid. Respondents requested an oral hearing. Accordingly, oral hearings were held on November 22 and 23, 1983, in Billings, Montana, before Joanne I. Schwartz of the Office of General Counsel of this Department. Complainant was represented by John R. Davidson, Esquire, of Davidson, Veeder, Baugh, Broeder, Poppler & Michelotti, Billings, Montana. Respondents were represented by Robert M. Cook, Esquire, Norfolk, Nebraska. Complainant testified on his own behalf and introduced six exhibits. Three witnesses testified for respondents who introduced two exhibits. After the oral hearing was held, complainant requested leave to introduce rebuttal evidence by deposing two individuals who did not appear at the hearing. Although orders were issued to depose both of these two individuals using written interrogatories and cross-interrogatories, complainant encountered difficulties in his attempts to depose one of them, and eventually agreed to proceed without that individual's deposition. Briefing by the parties was completed on November 18, 1985.

FINDINGS OF FACT

1. Complainant Leo Zemliska (hereinafter "Zemliska") is an individual doing business as "Professional Feeder Consultants," with his principal place of business located at Newcastle, Wyoming. At all times material herein, Zemliska was registered with the Secretary as a dealer to buy and sell livestock for his own account and as a market agency to buy livestock on commission for the account of others. Zemliska has been engaged in the livestock business for many years.

2. Respondent Glasgow Livestock Sales Company, at all times material herein, was a corporation registered with the Secretary as a dealer to buy and sell livestock for its own account and as a market agency to sell livestock on a commission basis for the account of others. The corporate respondent had its principal place of business located in Glasgow, Montana. Fjeldheim Livestock, Incorporated, is the successor corporation to Glasgow Livestock Sales Company.

3. Respondent Robert D. Fjeldheim is an individual who at all times material herein was the president and sole stockholder of the corporate respondent. The respondents hereinafter will be referred to collectively as "Fjeldheim." Fjeldheim has been engaged in the livestock business for many years.

4. During August of 1981, Fjeldheim received an order from one Marlyn Dahlquist (hereinafter "Dahlquist") of Laurel, Nebraska, to

purchase approximately 1,000 heifers and heiferettes suitable for his feeding operations. Dahlquist operated feed lots in Laurel, Nebraska, and Avon, South Dakota, and wanted animals which were relatively young, with healthy mouths, not pregnant and, if properly fed, capable of gaining weight to the point where their meat would grade higher upon slaughter than it would have if the animals were slaughtered immediately after purchase. The livestock were to be furnished to Dahlquist subject to his approval. The agreement required Fjeldheim to use his own funds to purchase the livestock and to bill Dahlquist for the actual cost of the cattle plus a buying commission of $1.00 per hundredweight for his services.

5. In early December, 1981, as part of his continuing efforts to fill the order from Dahlquist, Fjeldheim requested Zemliska purchase some of the same type of animals at livestock auction markets in Sturgis and Belle Fourche, South Dakota. Fjeldheim told Zemliska that the cattle were to be purchased for a third party who had the right to reject them upon receipt, but Fjeldheim did not reveal Dahlquist's identity at this time. Like the Dahlquist-Fjeldheim agreement, the agreement between Fjeldheim and Zemliska required Zemliska to use his own funds to purchase the livestock and to bill Fjeldheim for the actual cost of the cattle plus a buying commission of $.50 per hundredweight to compensate Zemliska for his buying services. Zemliska was also responsible for arranging truck transportation of the animals to a destination which was to be communicated to the trucker after departure from the purchase location.

6. Pursuant to his order, in early December, 1981, Zemliska purchased two loads of cattle at Sturgis and Belle Fourche, South Dakota, arranged their transportation, and issued accountings to Fjeldheim, who accordingly reimbursed Zemliska, paid the agreed $.50 per hundredweight buying commission, and billed Dahlquist for the cost of the cattle plus a commission of $1.00 per hundredweight. There is no controversy between the parties regarding these two loads of cattle which were accepted by Dahlquist upon receipt.

7. Based on Dahlquist's acceptance of the cattle purchased by Zemliska at Sturgis and Belle Fourche, South Dakota, Fjeldheim instructed Zemliska to purchase additional livestock of the same type and quality at Torrington, Wyoming and St. Onge, South Dakota. Thereafter, on December 4, 1981, using his own funds, Zemliska purchased 345 head of livestock at Torrington Livestock Commission Company, Torrington, Wyoming. Zemliska billed Fjeldheim for $125,835.94 which included the buying commission of $1,481.55 of these 345 head. Fjeldheim accordingly issued a check to

Zemliska to reimburse him for the cost of the cattle and to pay the buying commission. Pursuant to instructions from Fjeldheim, these cattle were shipped to Dahlquist's feedlots in Avon, South Dakota, where they arrived on December 5, 1981.

8. On December 5, 1981, using his own funds, Zemliska purchased 112 head of livestock at Madden's Livestock Market, Inc., St. Onge, South Dakota, for $41,072.03 and billed Fjeldheim for $41,574.38 which included a buying commission of $502.35. Fjeldheim thereafter issued a check to Zemliska to reimburse him for the cost of the cattle and to pay the buying commission. These cattle were shipped, pursuant to instructions from Fjeldheim, to Dahlquist in Avon, South Dakota, on December 6, 1981, and arrived on December 7, 1981.

9. On or about December 7, 1981, Russell Hamilton, manager of Dahlquist's feedlots in Avon, South Dakota, telephoned Dahlquist in Laurel, Nebraska, to tell him the livestock received from Torrington, Wyoming, and St. Onge, South Dakota on December 5 and 7 were not heiferettes, did not conform, were not suitable for feeding and were not of the same type and quality as the livestock previously received from Sturgis and Belle Fourche.

10. Dahlquist personally inspected the cattle on December 9, 1981, and concluded only 91 out of the 457 head shipped from Torrington and St. Onge conformed to his order. On the same day, he telephoned Fjeldheim to reject the non-conforming cattle.

11. On December 9, 1981, pursuant to his order from Fjeldheim and using his own funds, Zemliska purchased 36 head of livestock at Torrington Livestock Commission Company, Torrington, Wyoming, for $13,711.47.

12. During the morning of December 10, 1981, before the cattle purchased the proceeding day could be shipped, Fjeldheim telephoned Zemliska to inform him that on December 9, 1981, Dahlquist had rejected the cattle which had arrived at his feedlots on December 5 and December 7 because there were "too many lumps and bumps and [the livestock] did not conform to the order." Transcript, p. 159. Fjeldheim instructed Zemliska to resell in Torrington the 36 head purchased on December 9 and promised to indemnify him for any loss upon resale. When resold, these 36 cattle incurred a loss of $2,813.48.

13. On December 10, 1981, Zemliska purchased 113 head of livestock from Fjeldheim for $26,658.30, which amount has not been paid.

14. On December 10, 1981, Fjeldheim agreed to pay one half the air fare for Zemliska to fly to Avon, South Dakota in order that he,

Zemliska, could inspect the cattle which Dahlquist had rejected. The total air fare for the trip was $425.00.

15. Zemliska inspected the cattle on December 11, 1981. Thereafter, on several occasions between December 11 and December 30, 1981, Zemliska, Fjeldheim, Dahlquist and his agents, and South Dakota brand inspectors examined the cattle which had been rejected by Dahlquist. These examinations were prompted by Zemliska's contention that the cattle Dahlquist had rejected were not all the same cattle he had purchased at Torrington, Wyoming, and St. Onge, South Dakota, on December 4 and 5 respectively.

16. On or about December 11 or 12, 1981, Zemliska entered into an agreement with Russell Hamilton, subsequently ratified by Dahlquist, wherein Dahlquist agreed to feed the rejected livestock for Zemliska until Zemliska could ascertain whether the livestock were in fact those which he had purchased at Torrington and St. Onge.

17. On December 14, 1981, Fjeldheim stopped payment on the checks which had been issued to pay for the cattle purchased by Zemliska pursuant to order on December 4 and 5, 1981.

18. On December 30, 1981, Zemliska arranged for the resale of 363 head of the 457 head of disputed livestock at auction markets in Yankton and Mitchell, South Dakota. Zemliska received proceeds from those resales totalling $113,070.99.

19. Out of the disputed 457 head, three died before they could be resold, one in transit to Dahlquist's feedlots and the other two while in the feedlots. Zemliska has received insurance compensation of $296.12 for the animal that died in transit.

20. The remaining 91 head out of the disputed 457 head were resold to one Gary Erwin and generated net proceeds of $38,663.82, which amount Fjeldheim has retained and not remitted to Zemliska.

SUBSIDIARY FINDINGS AND CONCLUSIONS

Zemliska contends, in effect, that he properly purchased 457 head of livestock pursuant to an order received from Fjeldheim, and that by the time they were inspected by Fjeldheim's prospective purchaser, Dahlquist, some unknown party or parties had mixed in or substituted different cattle for some of those he had purchased. Further, Zemliska contends that even if the livestock did not conform to the order, Dahlquist and hence Fjeldheim did not reject them in a timely manner. Zemliska argues that he purchased the livestock as an agent for Fjeldheim who, as the owner of the livestock, must bear the loss incurred when Dahlquist improperly rejected the cattle and they had to be resold. Fjeldheim, on the

other hand, claims that Zemliska was not an agent, rather he was the seller to Fjeldheim who as the buyer rightfully rejected the livestock which did not conform to the contract of sale. Therefore, Fjeldheim argues, Zemliska as seller must suffer the losses incurred in the salvage sale of the nonconforming cattle. Neither party's argument can be entirely endorsed. Although Zemliska correctly argues that he acted as Fjeldheim's agent, that fact does not permit him to recover all the expenses and losses claimed in this case. On the contrary, by unjustifiably tendering livestock which concededly did not conform to the order, Zemliska failed to fulfill his duty as an agent to follow instructions and cannot be indemnified for the losses and expenses occasioned by the transactions.

Nature of Relationship Between the Parties

Section 1 of the Second Restatement of Agency provides as follows:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> (2) The one for whom action is to be taken is the principal.
>
> (3) The one who is to act is the agent.

The agreement between Zemliska and Fjeldheim clearly manifests a contract of agency. Fjeldheim gave instructions as to the type of cattle to buy, where to buy them, at what price and weight, and where to send them after purchase. Zemliska acted subject to Fjeldheim's control and primarily for Fjeldheim's benefit, not his own, which distinguishes their relationship from that of a buyer and seller.

> One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.

Section 14K, Restatement of Agency, 2d.

Zemliska was to be paid a flat commission of $.50 per hundredweight for his buying services. He was required to bill Fjeldheim for the exact costs of the cattle. This is a crucial fact in the determination of the nature of the relationship between the parties. If Zemliska had been a seller here, that is, a dealer rather than an agent, he would have been free to make a speculative profit in the venture. He was not. His only personal benefit was the flat per

hundredweight commission. Moreover, if the parties had been operating as buyer and seller rather than as principal and agent, it is very unlikely Fjeldheim would have felt obligated to promise indemnification, as he did, for any loss suffered on the 36 head of cattle Zemliska bought on December 9, 1981 at Torrington, Wyoming.

A considerable portion of the record in this case concerns brand certificates issued and reissued at various points by various persons. Under the best of circumstances, the brand certificates are merely *prima facie*, not conclusive, evidence of ownership. (Section 11-20-108 of Wyoming statutes of 1977.) The evidence in this case shows that at the time the cattle were purchased, Zemliska knew he was not purchasing them for his own account but rather for a third party whose identity was known to Fjeldheim but not to Zemliska at that time. Dahlquist's identity was revealed to Zemliska later. Under these circumstances, it was understandable and reasonable for Zemliska to identify Fjeldheim as the "owner." Since there is no evidence the brand inspectors who filled out the original brand certificates had any source of information about the relationship between the parties independent of Zemliska, those brand certificates cannot be taken conclusively to determine the true ownership of the cattle. They merely reflect what Zemliska told the brand inspectors. The reissued brand certificates in the record are likewise unreliable indicators of ownership because the person who filled them out was not shown to be aware of the true nature of the relationship between the parties.

Invoices, health certificates and bills of lading in the record variously designate both Zemliska and Fjeldheim as the person who was "owner," "shipper," "consignor," "consigned to," "consignee," and "purchaser." Like the brand certificates, these documents do not reveal or determine the true nature of the relationship between the parties.

The ultimate purchaser of the disputed livestock was to be Dahlquist. The agreement between Dahlquist and Fjeldheim was identical to the Fjeldheim-Zemliska agreement except that Dahlquist agreed to pay a buying commission of $1.00 per hundredweight over the exact cost of the cattle rather than the $.50 per hundredweight Fjeldheim agreed to pay Zemliska for Zemliska's services. Fjeldheim's sole personal benefit from the transactions derived from the flat-rate buying commission. Like Zemliska, he was not free to make a speculative profit from the deal. In other words, like Zemliska, Fjeldheim also was acting as an agent. Zemliska was the subagent for Fjeldheim, the agent for Dahlquist, the principal.

Duties and Liabilities of the Parties

The Second Restatement of Agency and Corpus Juris Secundum set out the following rules defining the duties and liabilities of the parties in this case:

> (1) Unless otherwise agreed a subagent who knows of the existence of the ultimate principal owes him the duties owed by an agent to a principal, except the duties dependent upon the existence of a contract.
>
> (2) Unless otherwise agreed, a subagent owes the agent the duties of an agent to his principal.

Restatement of Agency, 2d, § 428.

Comment(c) to section 428 describes the situation where Zemliska knew that he was purchasing cattle for an unknown third party.

> (c) Principal partially disclosed. A subagent who knows of the existence but does not know of the identity of the principal has in general the same liabilities as one who knows of the identity of the principal.

Zemliska was obliged to obey instructions from Fjeldheim.

> It is an agent's duty to adhere faithfully to all instructions given him by his principal, and his violation of the instructions will serve to make the agent liable for any loss or damage which may result therefrom.

3 C.J.S. Agency § 288

If Zemliska followed instructions, Fjeldheim is required to indemnify him for expenses and losses.

> The general rule is that where one is employed or directed by another to do an act in his behalf, not manifestly wrong, the law implies a promise of indemnity by the principal for damages resulting from or expenditures incurred as a proximate consequence of the good faith execution of the agency . . .

3 C.J.S. Agency § 321.

However, if Zemliska did not obey instructions and committed unauthorized acts, Fjeldheim is not required to indemnify the losses and expenses caused by the unauthorized acts.

> Unless otherwise agreed, the principal is not subject to a duty to indemnify an agent:

(a) for pecuniary loss or other harm, not of benefit to the principal, arising from the performance of unauthorized acts or resulting solely from the agent's negligence or other fault . . .

Restatement of Agency, 2d, § 440

The Dahlquist-Fjeldheim cattle order called for heifers and heiferettes in healthy condition and suitable for feeding purposes. Invoices in the record show a majority of the cattle Zemliska purchased were cows, not heifers or heiferettes.[1] Gail Sohler, the owner and operator of the auction market where many of the rejected cattle were resold testified that the rejected cattle were "all butcher cows." (TR 360) Mike Madden, owner and operator of the auction market in St. Onge where Zemliska purchased 112 of the disputed livestock, testified that Zemliska bought 82 aged cows and 30 heiferettes. (TR 226, 228) In his deposition, Dallas Larson said he was present at the December 4, 1981, sale at Torrington when Zemliska was buying and saw the purchase of animals which would not qualify as heiferettes. Moreover, invoices made out at the time Zemliska purchased the animals in dispute show several which were "lame," "rough," or suffering from a cancerous eye, conditions which adversely affected their suitability for feeding purposes. It is therefore clear that many of the 457 head of cattle which are subject of this dispute did not conform to that order in that they were not heifers, were too old to be heiferettes or were not suitable for feeding purposes; they were cows suitable only for butcher purposes.

In fact, Zemliska does not dispute that a significant number of the livestock did not conform to the order, but he claims he did not buy them. Rather, he argues there had to have been a mix-up at some point along the line from his purchase to rejection by Dahlquist. In other words, Zemliska contends that he followed his principal's instructions, but that someone else was responsible for the delivery of non-conforming livestock. This argument is unpersuasive. There is *prima facie* proof Zemliska violated instructions, but he has failed to carry his burden to prove he was not responsible for the delivery of cattle which did not conform to the order.

[1] Although there is some considerable debate in the record concerning the exact meaning of "heiferette," there can be no doubt that the term does not include butcher cows. (*See, Grischott* v. *Willard*, 28 Agric. Dec. 423 (1969) where it was found that the disputed animals were cows and too old to be "heiferettes," making them unfit as feeders.)

> The principal has the burden of proving that the agent has been guilty of negligence or misconduct or has violated instructions; these matters will not be presumed, but where there is prima facie proof thereof, the agent has the burden of showing facts relieving him from liability or reducing the amount of damages.

3 C.J.S. § 507; *See also, Robbins* v. *Roumel*, 138 A.2d 922 (D.C. 1958).

Zemliska submitted into evidence lists of back tag numbers reportedly attached to the cattle at the time they were purchased, along with lists of back tag numbers purportedly found on some of the cattle purchased at St. Onge when inspected at Dahlquist's feedlots. These lists show gaps in the numbers, unassigned numbers, missing tag numbers, and unexplained and undecipherable notations. Therefore, these lists do not support Zemliska's argument that the back tag numbers do not match, thereby proving a mix-up of the cattle.

Terry Gropper was the South Dakota brand inspector who prepared the brand inspection certificate for the 112 head of cattle Zemliska purchased at St. Onge, South Dakota, on December 5, 1981. Mr. Gropper twice went to Avon, South Dakota, at Zemliska's request to check the brands. Although Zemliska did not call Mr. Gropper to testify at the hearing, the investigation report, served on Zemliska before the hearing, contains a memorandum of a conversation Mr. Gropper had with an investigator from the Packers and Stockyards Administration. That memorandum indicates Mr. Gropper said the cattle he found in Avon were the same cattle he issued a market clearance for on December 5, 1981, after the auction at St. Onge.[2] The content of this conversation was corroborated by Mike Madden, owner and operator of the St. Onge auction market, who testified at the hearing that Mr. Gropper reported the same conclusion to him.[3] Further, Mr. Madden and his employees

also conducted an independent investigation which reached the same conclusion.

Zemliska himself testified to the effect that he found the majority of the 345 cattle he purchased at Torrington, Wyoming arrived at the Dahlquist feedlots. He specifically remembered only three head out of the 345 as not purchased by him because "they were older cows." (TR 169) Finally, The affidavit in the record from Lester W. Maxfield, owner and operator of the auction market in Torrington, contains Maxfield's statement that "it is my opinion that Mr. Zemliska loaded out on trucks the exact 345 head of cattle that he purchased." In sum, the preponderance of the evidence does not support Zemliska's uncorroborated contention that a significant number of the cattle found at Dahlquist's feedlots were not the same cattle he had purchased at St. Onge, South Dakota, and Torrington, Wyoming on December 4 and 5, 1981.

Zemliska also argues, in effect, that even if all the cattle did not conform to the order, Dahlquist and his agents initially took action inconsistent with rejection and failed to reject the cattle within a reasonable time. Both parties improperly cite Article 2 of the Uniform Commercial Code on sales in their arguments regarding this issue. Since the parties are not buyer and seller but rather are principal and agent as to each other, agency law, not sales law, governs this dispute. *See* UCC § 1-103 and *Manger* v. *Davis*, 619 P.2d 687 (Utah, 1980); *Cairo Co-op Exchange* v. *First National Bank of Cunningham*, 608 P.2d 1370 (Kan. 1980). Cast in agency terms, Zemliska is arguing that Dahlquist must be taken to have impliedly ratified his unauthorized purchase of non-conforming cattle by treating the livestock in a manner consistent with acceptance and by failing to reject the cattle until two to five days after delivery. That argument has no merit.

> The principal must have full knowledge of the unauthorized act of his agent and an opportunity to repudiate the same before any delay in repudiating the act in question can constitute a ratification thereof.
>
> * * * * * * *
>
> The principal does not ratify an unauthorized act if he repudiates it with reasonable promptness after learning the facts, instant repudiation not being essential to avoid ratification

2A C.J.S. Agency § 87, 89.

The Torrington cattle arrived in Avon, South Dakota, on Saturday, December 5, and the St. Onge cattle arrived on Monday, December 7, 1981, the same day Dahlquist's employee, Russell Hamilton, called him in Laurel, Nebraska to report that the cattle did not conform to the order. Russell Hamilton obviously did not have authority on his own motion to reject the cattle, or he would have done so without contacting his employer. Dahlquist personally inspected the cattle on Wednesday. He then immediately communicated rejection to Fjeldheim who in turn passed the word to Zemliska on Thursday morning, December 10. Under these circumstances, we find that repudiation of Zemliska's unauthorized act, that is, the purchase of non-conforming livestock, occurred with reasonable promptness after Dahlquist learned the facts.

Although Dahlquist's feedlot employees apparently initially treated the livestock in a manner which would have been consistent with acceptance by their employer, this treatment cannot be deemed acceptance, particularly in the absence of any showing that these employees had authority from Dahlquist to reject livestock purchased on order, or in the absence of any evidence that Zemliska was prejudiced either by the short lapse of time between delivery and rejection or by the treatment the cattle received while in Dahlquist's custody before rejection.[4]

In summary, Zemliska, in violation of instructions, purchased livestock which did not conform to the Dahlquist-Fjeldheim order and which were rightfully rejected by Dahlquist in a timely manner. Because Zemliska violated his order-buying instructions without justification, we hold that he, not Fjeldheim, is liable for losses and expenses incurred in connection with his purchase of the non-conforming livestock. 3 C.J.S. Agency § 288. The complaint will be dismissed as to those losses and expenses, which include the losses generated upon resale of the livestock, plus telephone, travel, brand inspection and trucking expenses incurred with respect to the livestock rightfully rejected by Dahlquist. This conclusion, based on the facts of this case, comports with record evidence show-

[4] The investigation report contains a memorandum to file by Dennis Thalacker, Packers and Stockyards Administration, memoralizing his interview of Oliver Dicken, auctioneer at Torrington Livestock Commission Co., Torrington, Wyoming. Mr. Dicken is reported to have compared various average cattle prices on December 4 and December 11, 1981, and to have concluded that "it was evident that the going price paid for various types of cattle had declined about $2.00 per hundredweight." If Mr. Dicken's conclusion was well-founded, it suggests a possible bad faith motive for rejecting the livestock. However, since Dahlquist was not called to testify and there is no other evidence on this point, on the basis of this record we must conclude that Dahlquist acted in good faith when he rejected on December 9 the livestock purchased by Zemliska on December 4 and 5.

ing that as a general rule in the livestock industry, a livestock order buyer bears the risk of loss for delivery of non-conforming livestock.

Fjeldheim received the proceeds from the sale of the 91 head of livestock which in fact conformed to the Dahlquist-Fjeldheim order. Failure to reimburse an agent for the full amount of the purchase price plus costs of livestock properly purchased on order constitutes an unjust practice in violation of the Act for which reparation may be awarded. *Frank Novy* v. *Western Iowa Farms Co., d/b/a Martin Bros. & Co.*, 33 Agric. Dec. 23 (1974); *Southwest Cattle Co.* v. *Betts*, 28 Agric. Dec. 426 (1969).

Fjeldheim concedes he owes Zemliska the following amounts:

$38,663.82	proceeds from resale of 91 head to Gary Erwin which reimburses Zemliska for the cost thereof and includes Zemliska's buying commission thereon
1,216.06	shipping cost for the 91 head
2,813.48	loss incurred upon resale of 36 head purchased on December 9, 1981
212.50	one-half of air fare for Zemliska's trip to Avon
$42,905.86	

From this amount must be deducted $26,658.30 which both parties agree Zemliska owes Fjeldheim for 113 cattle purchased on December 10, 1981, leaving a total of $16,247.56.

Fjeldheim claims an additional setoff of $11,875.28 for feed he contends Zemliska owes Dahlquist. However, Fjeldheim was not a party to the contract wherein Dahlquist agreed to feed cattle for Zemliska, nor has Fjeldheim become subrogated to Dahlquist's rights under that contract. Therefore, Fjeldheim is without standing to assert the purported feed bill of $11,875.28 as a setoff claim against Zemliska. Accordingly, Fjeldheim will be ordered to pay Zemliska as reparation $16,247.56 plus interest.

Three out of the subject 457 cattle died, one in transit to South Dakota for which Zemliska has received insurance compensation and two others after arrival at Dahlquist's feedlots. The record does not reveal whether or not these two conformed to the Dahlquist order. Since Zemliska has the burden of proving his damages, no reparation can be awarded for the two cattle which died after delivery to Dahlquist.

All contentions of the parties presented for the record have been carefully considered whether or not specifically mentioned herein.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, 42. F.R. 4395, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. §§ 450c–450g. It constitutes an "order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section, if respondents do not comply with this order within the time limit in this order, comlainant may within one year of the date of this order file in the district court of the United States for the district in which they reside or in which is located the principal place of business of respondents, or in any state court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon appeal. That section further provides that if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file of this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On the Secretary's jurisdiction to issue this order, see discussion in *Neugebauer* v. *Ryken,* Civ. 74-4018, U.S.D.C., D. So. Dak., So. Div. 1975, 34 Agric. Dec. 1712; *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.,* 210 Nebr. 382, 315 N.W.2d 229, 41 Agric. Dec. 48 (1982).

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 CFR § 202.117.

On the respondents' right to judicial review hereof, see *Maly Livestock Commission* v. *Hardin, et al.,* 446 F.2d 4, 30 Agric. Dec. 063 (8th Cir. 1971). On complainant's right to judicial review hereof, see *United States* v. *I.C.C.,* 337 U.S. 426.

ORDER

That part of the complaint filed herein is dismissed which seeks recovery from losses and expenses incurred by complainant Leo Zemliska in connection with the rejection by Marlyn Dahlquist of all but 91 head out of 457 head of livestock purchased on order by complainant Leo Zemliska for respondents Glasgow Livestock Sales Co. and Robert D. Fjeldheim.

Within thirty days from the date hereof, respondents Glasgow Livestock Sales Co., its successors and assigns, and Robert D. Fjeldheim shall pay complainant Leo Zemliska as reparation the sum of $16,247.56 with interest thereon at the rate of 13 per cent per annum from February 1, 1982, until paid.

Copies hereof shall be served upon the parties.

COURT DECISIONS

ROBERT L. REEVES, CHARLES W. REEVES, JAMES C. REEVES *v.* UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE. Civil Action Nos. 85-1517, 85-1518, 85-1519. Decided May 28, 1986.

United States Court of Appeals District of Columbia

PETITIONS FOR REVIEW OF ORDERS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE: WALD and GINSBURY, Circuit Judges and RE, Chief Judge of the United States Court of International Trade (sitting by designation).

JUDGMENT

These consolidated petitions for review of decisions of the Administrator of the Agricultural Marketing Service were briefed and argued by counsel for the parties. The court has considered the issues petitioners present and finds they occasion no need for a further opinion. *See* D.C. Cir. R. 13(c).

Our review of the record satisfies us that petitioners have failed to demonstrate that they are not "responsibly connected" with a dealer. Unlike *Quinn* v. *Butz*, 510 F.2d 743 (D.C. Cir. 1975), and *Minotto* v. *U.S. Dep't of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983), petitioners here are in no sense subordinate to or under the control of the principal actor in the company in question. The evidence amply shows that petitioners acted of their own volition, and became affiliated as directors and stockholders of Reeves Produce because they believed the business would yield them a profit. The evidence further shows that they failed to exercise due care to determine whether Reeves Produce was being managed in accord with legal requirements imposed by the Perishable Agricultural Commodities Act. It is therefore

ORDERD and ADJUDGED that the petitions for review are denied and the decisions of the Administrator are affirmed.

Per Curiam

REEVES PRODUCE, INC. *v.* UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, CIVIL ACTION NO. 85-1602. DECIDED MAY 28, 1986.

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.

Before: WALD and GINSBURY, Circuit Judges and RE, Chief Judge of the United States Court of International Trade (Sitting by designation).

JUDGMENT

This petition for review of a decision of the Secretary of Agriculture was briefed and argued by counsel for the parties. The court has considered the issues petitioner presented and finds they do not merit a further opinion. *See* D.C. Cir. R. 13(c).

Substantial evidence, summarized in the findings and conclusions of the Administrative Law Judge and Judicial Officer, fully supports the determination that Reeves Produce committed flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4). Furthermore, the record evidence plainly warrants the sanction ordered. It is therefore

ORDERED and ADJUDGED that the petition for review is denied and the decision of the Secretary is affirmed.

Per Curiam

DISCIPLINARY DECISIONS

In re: TED SOBIECH. PACA Docket No. 2-6902. Decided May 8, 1986.

Failure to pay promptly—License suspended—Consent.

Edward M. Silverstein, for complainant.
Jeffrey D. Sherwin, Middletown, New York, for respondent.

Decision by John A. Campbell, Chief Administrative Law Judge, for Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 24, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April 1984 through February 1985, respondent purchased, received and accepted, in interstate commerce, from nine sellers, 39 lots of onions, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $144,723.41.

A copy of the complaint was served upon respondent. On August 28, 1985, an answer was filed by respondent in which he denied violating the Act as alleged by complainant. Complainant moved for the setting of a definite date for hearing, and, on February 20, 1986, the matter was set down for hearing on April 1, 1986, in New York City, New York. A prehearing conference, by telephone, was held on March 13, 1986. Complainant's counsel appeared at the April 1, 1986, hearing and reported that, at 11:15 the previous evening, the parties had agreed to settle this matter without hearing. Therefore, with the consent of the parties, the following Decision and Order is issued.

FINDINGS OF FACT

1. Respondent, Thaddeus J. Sobiech t/a Ted Sobiech, is an individual, whose mailing address is Box 158, Pine Island, New York 10969.

2. Pursuant to the licensing provisions of the Act, license number 152721 was issued to respondent on June 29, 1954, was renewed annually, presently is in effect, and is subject to renewal on or before June 29, 1986.

3. As more fully set forth in paragraph 5 of the complaint, during the period April 1984 through February 1985 respondent purchased, received and accepted in interstate commerce, from nine sellers, 39 lots of onions a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $144,723.41.

4. The amounts due and owing the nine sellers referred to in paragraph 3 above has now been paid, and respondent appears to be current in his payments to his suppliers.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 39 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is suspended for 80 days.
This Order shall take effect on May 15, 1986.
This Decision will become final upon its issuance.
Copies hereof shall be served upon the parties.

In re: TED SOBIECH. PACA Docket No. 2-6902. Decided May 19, 1986.

Correction of decision—Consent.

Edward M. Silverstein, for complainant.
Jeffrey D. Sherwin, Middletown, New York, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CORRECTION TO CONSENT DECISION

The oral hearing was held herein on April 1, 1986, during which a settlement agreement was reached on the record. Same was to be reduced to writing and presented to the Administrative Law Judge. This was not done until May 7, 1986, at a time when the Judge was out of town on another hearing and the Consent Decision was signed in her absence.

Paragraph 4. thereof is hereby corrected to read:

> The amounts due and owing the nine sellers referred to in paragraph 3 above have now been paid, and respondent appears to be current in his payments to his suppliers.

Copies hereof shall be served upon the parties.

In re: H & J BROKERAGE, INC. PACA Docket No. 2-6437. Decided May 22, 1986.

Appeal of denial of application for license—Denial affirmed.

The Judicial Officer affirmed Judge Baker's decision denying respondent's application for a license on the ground that Mr. Scharf, respondent's president, treasurer, and 75% stockholder, played a major role in the failure of Fresh World, Inc., to pay 20 shippers for over $331,000 worth of produce. Although Mr. Scharf was not solely responsible for Fresh World's failures to pay, he was general manager of Fresh World and was primarily responsible for its sales to Central Produce, whose failure to pay $242,000 to Fresh World was a major factor in Fresh World's failure to pay its suppliers. It is immaterial that Mr. Scharf was not "responsibly connected" with Fresh World, as that term is defined in the Act. Explanation as to when a "responsibly connected" determination is relevant. It is only necessary for complainant to show that Mr. Scharf engaged in practices of the character prohibited by the Act. The inclusion of a term in one section of the Act, while omitting it in another, emphasizes that it should not be implied in the place where it was omitted. The Act has been interpreted in a tough and harsh manner, with the support of the industry. Excuses are routinely rejected in failure to pay and failure to pay promptly cases. Once complainant establishes that Mr. Scharf engaged in practices of the character prohibited by the Act, the burden of proof is on respondent to show that it is fit to receive a license. It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy. In a hearing conducted at intervals, there is little or no basis for respondent's complaint as to the adequacy of the administrative complaint. The ALJ should require the parties to number the pages of multi-page exhibits.

Dennis Becker, for complainant.
Burton I. Manis, Boca Raton, Florida, for respondent.
Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on July 24, 1985, denying respondent's application for a license on the ground that Donald Scharf, who is respondent's president, treasurer, only director, and 75% stockholder, played a major role in the failure of Fresh World, Inc.,

* *See generally* Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1985 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980).

to pay 20 shippers for over $331,000 worth of produce from June 1983 through September 1983.

On December 9, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).** On March 25, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order, with material added by the Judicial Officer included in brackets. In addition, a few trivial changes not included in brackets have been made. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

PRELIMINARY STATEMENT

This is an administrative action brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter sometimes referred to as the "PACA." It arises by reason of a Notice to Show Cause filed on December 12, 1983, wherein it is alleged that the Application of Respondent corporation, a New Jersey corporation, filed on November 14, 1983, reflects that Donald Scharf is the president, treasurer, director and holder of 75 percent of the outstanding stock of said H & J Brokerage, Inc. It is further alleged that said Donald Scharf was president and/or general manager and/or director of Fresh World, Inc., a California corporation, holding a PACA license certificate, and that said Fresh World, Inc. allegedly violated Section 2(4) of the PACA (7 U.S.C. 499b(4)) during the period June 1983 through September 1983 by failing to make full payment promptly to 20 sellers of the agreed purchase prices, or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultur-

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

al commodities purchased, moved, and accepted in interstate or foreign commerce.

The Notice to Show Cause further alleges that during the period June 1983 through September 1983, Donald Scharf, acting as general manager, made all decisions regarding from whom Fresh World, Inc. would purchase and to whom it would sell perishable agricultural commodities. It is further stated that during the above period, Donald Scharf sold to Central Produce Corp., San Juan, Puerto Rico, substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp. to Fresh World, Inc. of more than $300,000.00 to accrue. It is further alleged that Central Produce has failed and refused to pay this indebtedness. Until August 9, 1983, it is stated that Donald Scharf had authority to issue checks for Fresh World, Inc.

The reason stated that the issuance of a license to Respondent, H & J Brokerage, Inc., has been withheld is because Mr. Scharf is the Respondent corporation's president, treasurer, director, and holder of 75 percent of the outstanding stock and it is alleged that Mr. Scharf as president, director, and/or general manager of Fresh World, Inc. is responsible for the commission of violations of PACA in that:

Section 2(4) of the PACA (7 U.S.C. 499b(4)) provides as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> (4) For any commission merchant, dealer or broker, to make for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail, or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

And that, during the period June, 1983, through September, 1983, Fresh World, Inc. violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of

the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce.

Despite these clear assertions in the Complaint, the Complainant, on brief, and through the evidence which it either adduced, or sought to admit into evidence, seeks to enlarge upon the reasons why the Respondent should not be granted a license under the PACA. This is done through reference to Mr. Scharf's prior associations with other firms with which he has been associated. It should be remembered that this is not an action against Fresh World, Inc. nor the determination of responsibility of that entity, and its officers, and shareholders as to the requirement of payment to its suppliers. However, official notice is taken herein of a Default Decision against Fresh World, Inc., PACA 2-6526 (October 4, 1984).

As will be set forth more fully hereinafter, the Secretary of Agriculture has a wide area of discretion with respect to the granting of licenses, and if there is legally sufficient basis for his denying a license application, then, a substitution of judgment is not appropriate.

Further, it is alleged in the Notice to Show Cause, that:

> "Section 9 of the PACA (7 U.S.C. 499i) requires that records of business transaction by commission merchants, dealers and brokers be maintained so as fully and correctly to disclose all transactions involving perishable agricultural commodities. On information and belief, Mr. Scharf either caused records pertinent to the transactions set forth * * * above, not to be maintained, or took such action which has made them unavailable for inspection by the Department, in violation of the PACA and regulations issued thereunder."

Also the Notice to Show Cause relies upon the Statutory provision:

Section 4(d) of the PACA (7 U.S.C. 499d(d)), in pertinent part, provides as follows:

> (d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, . . . or in case the applicant is a corporation, any officer or holder of more than [1] 10 per centum of the

[1] There was an error of omission in the quote in Paragraph 9 of the Complaint.

> stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . the Secretary may refuse to issue a license to the applicant.

The Respondent maintains that it is entitled to the license for which application has been made and in support thereof alleges that although Donald Scharf was named as the president on the license of Fresh World, Inc., a California corporation, he never acted as such; that in a letter sent to the United States Department of Agriculture under date of March 23, 1983, Donald Scharf requested that his name be removed as president of Fresh World, Inc.; that on March 29, 1983, David Dixon took over the ownership of Fresh World, Inc. and received the majority of the stock of Fresh World, Inc., it being Respondent's information and belief that Karl Allen retained a minority ownership of the stock of Fresh World, Inc.; that although Donald Scharf acted as manager of Fresh World, Inc., from March 29, 1983, to the early part of August, 1983, said management was subject to the control and direction of David Dixon; and that in the early part of August, 1983, and without hisknowledge, Donald Scharf's authority to sign checks was withdrawn from the bank by David Dixon who handled the financial matters of Fresh World, Inc. It is further alleged that David Dixon made the managerial decisions of Fresh World, Inc. from June, 1983, to September, 1983.

The first session of the oral hearing commenced on February 8, 1984, and continued to February 9 and 10, 1984, in San Francisco, California. Pursuant to agreement of the parties, the hearing continued thereafter on April 4 and 5, 1984, in San Francisco, California.

The oral hearing was held before Administrative Law Judge, Dorothea A. Baker. The Complainant was represented by Dennis Becker, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250, and the Respond-

ent was represented by Eugene Epstein, Esquire, Shostak, Epstein and Boyd, 144 West Gabilan Street, P.O. Box 2164, Salinas, California, 93902.

The last brief was filed herein on September 17, 1984.

FINDINGS OF FACT

1. Respondent, H & J Brokerage, Inc., is a New Jersey corporation with a business address at 1287 North Main Street, Suite 109, Salinas, California, 93909, and on November 14, 1983, filed a license application which, if issued, would authorize H & J Brokerage, Inc. to engage in the business of handling fruits and vegetables or perishable agricultural commodities in interstate or foreign commerce as a dealer or broker.

2. That license application reflects that Donald Scharf is the President and Treasurer, a 75 percent stockholder, and the only director of Respondent. Said License application further reflects that the other 25 percent of the stock is held by Howard Chaplin, M.D. Donald Scharf also currently holds a license to do business as H & J Brokerage, which is a sole proprietorship.[2]

3. Pursuant to the licensing provisions of the PACA, license No. 820039 was issued to Fresh World, Inc., on October 14, 1981, and was renewed in 1982, but was allowed to lapse when it was due for renewal in October, 1983.

4. The Secretary of Agriculture has jurisdiction of the subject matter of this proceeding.

5. On December 12, 1983, the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, issued a "Notice to Show Cause" indicating that the issuance of a license to H & J Brokerage, Inc. was withheld at that time pursuant to Section 4(d) of the PACA inasmuch as Donald Scharf had allegedly engaged in practices in violation of the Perishable Agricultural Commodities Act.

6. The "Notice to Show Cause" reflects that the only allegation of wrongdoing on the part of Donald Scharf is that by reason of his association and position as general manager, during the period June, 1983, through September, 1983, the corporation known as Fresh World, Inc., a California corporation, whose mailing address is P.O. Box 4550, Salinas, California, 93912, failed to make full payment promptly to 20 sellers of the agreed-upon purchase prices, or balances thereof, in the total amount of $331,194.55 for 85 lots of

[2] In this proceeding the Secretary does not seem to object to the holding by Mr. Scharf of a license as a sole proprietor but asserts that the corporate "cloak" would allow, or be conducive to, unpaid creditors, without personal liability.

perishable agricultural commodities in interstate or foreign commerce and that Mr. Scharf "permitted" [3] an indebtedness of over $300,000.00 to accrue from Central Produce Corp., as well as an allegation pertaining to the failure to keep, maintain, and make available pertinent records.

7. The evidence establishes, and it is not disputed, that the amounts set forth in the Notice to Show Cause, or substantial portions thereof, remained unpaid by Fresh World, Inc., at the time of the oral hearing. Once the corporation, Fresh World, Inc., closed down its business in September, 1983, and the accounts receivable were taken by Mr. Dixon, and the accounts payable were either placed in storage or were unaccounted for, it cannot be ascertained if any of the amounts collected by either the Bank or Mr. Dixon were ever used to pay any of the accounts payable, although there may have been some small payments. However, several trades people testified as to the non-payments of their accounts.

8. Essentially, the Complainant frames the dispute herein as one concerning whether or not Mr. Donald Scharf was responsible for non-payment to the vendors of the amounts set forth in Paragraph 6 of the Notice to Show Cause. A principal witness, appearing on behalf of the Complainant, was Mr. Dixon, a majority owner of Fresh World, Inc., from at least March, 1983, who indicated that Mr. Scharf had the responsibility for the non-payment of the accounts. Mr. Scharf, the applicant/Respondent herein, maintains that the unpaid indebtednesses were attributable to persons other than him.

mutual acquaintance, Mr. Scharf became aware of Fresh World, Inc. during the latter part of June, 1982. The mutual acquaintance indicated that Fresh World, Inc. needed someone to buy and sell produce. Mr. Scharf met with Terry Allen, who was the President of Fresh World, Inc., during June, 1982, and as a result of discussions and a consultant-employment arrangement, Mr. Scharf commenced employment with Fresh World, Inc. during the last week of June, 1982. The initial employment arrangement was that Mr. Scharf would be employed as a consultant for 12 weeks at a salary of $1,000.00 per week, plus car allowances and medical insurance. Mr. Scharf had never been a seller or broker of produce before this employment [, but he has been in the produce business for 29 years, including buying for supermarket chains (Tr. 106, 781-82, 806-16), and he bought and sold produce for Amigo Foods (Tr. 806)]; Mr. Scharf did not have any responsibilities for the financial records of Fresh World, Inc., nor did he even look at them during the period when Terry Allen ran the corporation.

11. Early in the existence of Fresh World, Inc., Karl Allen received $15,000.00 from Fresh World, Inc. which he stated he considered repayment of funds advanced by him for the incorporation of Fresh World, Inc. During the latter part of 1982, Mr. Karl Allen indicated that he became concerned about his investment, and in December, 1982, Karl Allen, through the corporation's Treasurer, and his brother, Terry Allen, caused corporate funds to be distributed to him in the amount of $25,000.00. He still retained his 25 shares in the corporation. Even if Karl Allen's premise is correct that all he was doing was withdrawing his investment in the corporation, it conflicts somewhat with his theory that what he did was to make loans to the other three investors. Also, inasmuch as Karl Allen still retained his 25% interest in the corporation, the difference between $40,000.00 withdrawn and the $30,000.00 invested would be attributable to earnings of the corporation in the absence of evidence to the contrary.[3a]

12. Basically, the Complainant maintains that Respondent is unfit to receive a PACA license because Fresh World, Inc. did not pay its bills, and that Mr. Scharf was knowing, or permissive thereof. However, dilution of the earnings and/or capitalization of a company can also be a factor as to why it does not pay its creditors. Although neither party on brief addresses the situation, there is,

[3a Mr. Dixon considers the $40,000 withdrawal of funds by Karl Allen to be illegal (Tr. 357-63, 403-04), and he plans to institute an action against the Security Pacific Bank for $25,000 of that amount, because the $25,000 check was signed by Terry Allen, who was not authorized at that time to sign checks (Tr. 359, 488), and to recover the other $15,000 from Karl Allen (Tr. 488, 492-93).]

nevertheless, some evidence of record that there was a transaction involving a company referred to as Tamarack. The evidence in this regard is not sufficient to form any conclusions, but there is some testimony to the effect that Cameron Dale was a force in causing the Tamarack entity to provide collateralization for cash made available to Fresh World.

Undisclosed facts relating to the Tamarack corporation, of which Mr. Al Olson and Mr. Bob Paul were principals, preclude any determination as to the effect, if any, which the issuance of some 500 shares of stock of Fresh World, Inc., for the supplying of security for a $35,000.00 loan, and the subsequent surrender of such stock, as well as other matters associated with same, may have had on the financial aspects of Fresh World.

13. Mr. David Dixon became involved with Fresh World, Inc. in January, 1983. He became President of the corporation in March, 1983, by election of the Board of Directors, which consisted of himself and another individual. Mr. Dixon indicated that he first became aware of Fresh World through Cameron Dale whom he had known for approximately three years.

14. Mr. Dixon has been a principal stockholder of ten closely held corporations within the past fifteen years, including being the President and owner of Food Tech, Inc., and Food Source, Inc.

15. Mr. Dixon acquired 75 percent, or 75 shares of the stock of Fresh World, Inc. [in consideration for obtaining and guaranteeing a $500,000 line of credit for Fresh World]; and, Food Source, Inc., a corporation controlled by Mr. Dixon provided Fresh World, Inc., $70,000.00 [as a loan] in February, 1983.[*] No promissory note was received for these funds, and the $70,000.00 was subsequently withdrawn from Fresh World by Mr. Dixon, and paid to Mr. Dixon by the end of July, 1983.

16. Mr. Dixon sought to acquire the 100 shares outstanding in order to effectuate the total ownership of Fresh World, Inc.; however, Mr. Cameron Dale from whom Mr. Dixon acquired three signed certificates of stock, the signatures of which were not guaranteed,

[* Respondent's Proposed Findings of Fact, Conclusions, and Order filed August 22, 1984, states (p. 5):

> 15. DAVID DIXON acquired 75 percent or 75 shares of the stock of FRESH WORLD, INC. in exchange for his agreement to furnish a line of credit of $500,000.00 through SECURITY PACIFIC BANK to FRESH WORLD, INC. (Tr. 356)
>
> 16. FOOD TECH, a corporation controlled by DAVID DIXON loaned FRESH WORLD, INC. $70,000.00 in February 1983. (Tr. 360) No promissory note was received for this loan. (Tr. 361) $70,000.00 was repaid to DIXON by the end of July 1983. (Tr. 401)]

was unable to persuade Karl Allen to relinquish his stock. The 75 share acquisition was apparently done through Mr. Cameron Dale; Food Source, Inc. [and Mr. Dixon guaranteed payment of the $500,000 line of credit from Security Pacific National Bank, which was the consideration for the acquisition of the 75 shares. Under the line of credit, the bank agreed to loan Fresh World 70% of its "eligible" accounts receivable (i.e., those regarded by the bank as collectible).]

17. During the period January, February and March, 1983, Mr. Dixon had conversations with Mr. Scharf relating to matters pertaining to the corporation and with bank officials relative to the establishment of a line of credit from Security Pacific [referred to in Findings 15 and 16]. Fresh World was already doing business with the bank, and already indebted thereto. It was at this time that Terry Allen ordered Mr. Scharf to sign a collateral agreement as President of Fresh World. Mr. Scharf did not regard himself as President of Fresh World but was ordered to do this by Mr. Allen. Nevertheless, he acted in such capacity and held himself out to third persons as being President. Any third party has the right to rely upon officership as represented.

18. Prior to Mr. Dixon's acquisition of Fresh World, he reviewed numerous financial documents pertaining to its financial condition and knew of its negative net worth. Several of these documents consisted of unaudited statements. [However, in January 1983, when Mr. Dixon first looked at Fresh World's financial statement for December 31, 1982 (which shows "Total Capital" of $13,880.41 (CX 2, p. 2)), he understood that "Fresh World, Inc. had a net worth of approximately $14,000" (Tr. 485-86). Based on that understanding, his corporation (Food Source, Inc.) loaned $70,000 to Fresh World (see Finding 15). In the latter part of February 1983, Mr. Dixon received Fresh World's January 31, 1983, financial statement that was prepared on an accrual basis with accounts receivable judged to be uncollectible removed, and it showed "the company then moving to $125,000 negative net worth" (Tr. 161), actually negative $124,836.07 (CX 4, p. 2). Mr. Dixon was "angry at the fact we had already put money into the company on the basis of financial statements that Mr. Scharf had given me earlier showing a stronger company" (Tr. 161). Nonetheless, since Mr. Dixon was convinced by Cameron Dale and Mr. Scharf that Fresh World "could do much better" if capital were infused into the company (Tr. 963; see also Tr. 105, 107-08, 158-60), he subsequently provided the $500,000 guarantee resulting in his "acquisition" of Fresh World (see Findings 15-17).]

19. Mr. Dixon was furnished various Accountants' Compilation Reports which contained, among other things, the statements:

> A Compilation is limited to presenting in the form of Financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.
>
> Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters.

20. Mr. Dixon, prior to becoming President of Fresh World, Inc. caused the accountants, the Kemper Group, to convert the method of accounting from a cash basis to an accrual basis. Mr. Dixon believed that some of the accounts receivable were not good accounts, and should be eliminated so as to more correctly reflect the financial status of the corporation. The record does not disclose whether any of the eliminated accounts receivable were ever collected.

21. Mr. Scharf was hired by Mr. Dixon to buy and sell produce. Mr. Scharf received his instructions from Mr. Dixon as to the presentment of the invoices to Security Pacific Bank to receive advances on the accounts receivable.

22. Mr. Scharf bought and sold produce and acted as a broker for Fresh World, Inc.—he kept a record of each transaction in a separate folder which contained all the documents connected with each transaction. From time to time there were one or two other salesmen employed by Fresh World and each of them kept track of his own transactions. The record evidence does not disclose which, if any, of the unpaid creditors were the result of transactions with salesmen, other than Mr. Scharf.

23. Considerable evidence was adduced as to the financial situation of Fresh World, Inc. at the time of the stock acquisition by Mr. Dixon, who apparently turned the stock over to Food Source, Inc., which acted as a guarantor for the then existing liability of Fresh World, Inc. Despite the fact that apparently Food Source had the stock, nevertheless, Mr. Dixon did not believe that it had a positive value, and never entered it as an asset on the books of the corporation. In fact, according to advice which he said he obtained, Food

Source did not reveal either its contingent liability to the bank, or the asset value of the stock of Fresh World. Without having such items on its books, a potential creditor, etc. of Food Source would be unaware of such items.

24. Both Mr. Dixon and persons associated with him were sophisticated businessmen. Mr. Scharf had a high school education and was under a doctor's care [,i.e., he was seeing a psychologist twice a week (at Fresh World's expense) (Tr. 882, 966-69, 985-87).]

25. Complainant seeks to draw some sort of negative inference from Mr. Scharf's salary and other renumeration from the corporation, such as, that he was receiving, admittedly $1,500.00 salary per week and benefits which complaint alleges amount to $100,000.00 a year while other salesmen [for Fresh World] were receiving amounts of $15,000.00 and $20,000.00. By reason of this difference, the Complainant argues that Mr. Scharf was not a "mere salesman". This may be so, but there is nothing in the persuasive evidence to prove otherwise—i.e., that his salary was excessive, for instance there was no comparison of sales, results, duties, either intra-company or inter-company. Perhaps if such evidence were adduced it might be shown that salesmen with Mr. Scharf's background and ability to generate business might make more than he received. [From March 1983 through August 1983, Mr. Scharf was "General Manager" of Fresh World (CX 24, p. 3; Tr. 1009);[3c] he bought and sold produce without control as to prices, suppliers or

[[3c] Mr. Scharf at first denied that he was general manager of Fresh World. He testified (Tr. 950):

> Q. Did you ever consider yourself to be the general manager?
>
> A. There really wasn't a title addressed to myself.
>
> Q. Did you ever consider yourself to be the general manager?
>
> A. No.

However, Mr. Scharf later admitted that he was Fresh World's general manager, testifying (Tr. 1009-10):

> Q. From March of 1983 through August of 1983 did you ever have a title?
>
> A. Yes.
>
> Q. What was it?
>
> A. General manager.
>
> Q. Where did you get that title?
>
> A. Mr. Dixon gave it to me.

Similarly, Mr. Scharf stated in an affidavit (CX 24, p. 3) which he signed on November 25, 1983, after consulting with counsel (Tr. 1032-35):

> While I was employed at Fresh World, Inc., I was General Manager and worked with Jeff Leonard, a Salesman.]

customers (Tr. 1008-10; see also Tr. 109, 412-13, 787, 907-08, 964-65, 973-74);[3d] he had authority to hire and fire employees (Tr. 109, 687, 975, 988); he signed numerous bank documents (even prior to March 1983) (CX 15; Tr. 884-904), and starting in April 1983 he signed the documents that obtained the loans from Security Pacific Bank on the $500,000 line of credit (Tr. 789-91, 960-61, 970-71); and until August 9, 1983, he was authorized to sign (and signed) Fresh World's checks (Tr. 672, 907-08, 976, 1027), including salary checks (Tr. 787-88, 950), and checks to vendors and for other payables (Tr. 787-88, 965, 974).]

26. On or about the time that Mr. Dixon took over the ownership of the corporation, Miss Judy Allwardt came to Fresh World, Inc., as the bookkeeper and office manager, at first working on a part time basis and later on a full time basis. She previously had been employed by Mr. Terry Allen. Miss Allwardt subsequently left Fresh World, Inc., for a better position on or about August 10, or 11, 1983. She was replaced by Miss Leddemer. Miss Allwardt helped Miss Leddemer close the books for July, 1983. This was done the first half of August, 1983. In the [latter] part of [July], 1983, when Mr. Scharf wrote a check to himself [for $20,000, believing that he was entitled to 50% of the profits (Tr. 983-94)], Miss Allwardt caused Mr. Dixon to be informed [i.e., she told a lady at the bank, who relayed the information to a bank officer, who, in turn, told Mr. Dixon], and payment on the check was stopped [, but it was never negotiated since Mr. Dixon told Mr. Scharf that he was not entitled to the money. (Tr. 199-201)]

27. Miss Allwardt was in charge of the accounting aspects of the operation of Fresh World, Inc. Donald Scharf bought and sold produce and directed her to pay the vendors, and until his authority to do so was revoked, Mr. Scharf signed the checks therefor.

28. After becoming involved with the corporation, Mr. Dixon took steps to obtain a $500,000.00 line of credit with the Security Pacific Bank. [referred to in Findings 15-18, 25]. The bank utilized its normal banking procedural methods for an extension of a line of credit, whereby the accounts receivable are hypothecated as security, and such receivables were reviewed on a constant basis by the

[3d] Mr. Dixon testified that he told Mr. Scharf in July 1983 that the bank had refused to lend any more money on Central Produce accounts receivable and that Mr. Scharf should cut back the sales to Central Produce and collect the monies owed (Tr. 188, 475-76). Mr. Scharf admits that Mr. Dixon told him in the latter part of June or the early part of July that the bank would not loan additional money on the Central Produce receivables, but he testified that Mr. Dixon told him to continue selling as much merchandise as he could to Central Produce (Tr. 992). The ALJ did not resolve this conflict (see Finding 39).]

bank. The agreement for the line of credit agreement was signed in March, 1983, and that agreement was guaranteed by Food Source, Inc. and Mr. Dixon, personally. Before the close of the hearing, it was disclosed that in order for Security Pacific to recover the amount of its advances to Fresh World, Inc., Security Pacific had instituted legal proceedings against Fresh World, Inc., Food Source, Inc., and Mr. Dixon, personally.

29. The bank indicated that as of November, 1983, it wanted Fresh World's receivables out of its portfolio although the said receivables could be put back in December [(Tr. 209); i.e., the bank wanted the accounts receivable line of credit paid up by November 1983 (Tr. 456).] During the period March, 1983, through September, 1983, the bank had extended close to the $500,000.00 line of credit on the basis of the monthly gross volume of business evidenced by the accounts receivable, which included the account of Central Produce.

30. Utilizing its standard banking procedures, the accounts receivable were reviewed on a constant basis and those which were older than ninety days were regarded as ineligible to be carried in the security portfolio. In approximately June of 1983, Security Pacific decided not to loan anymore against Central Produce receivables and this was [because the bank did not want to have more than "a 20 percent exposure for any one particular account, . . . and Central Produce's account exceeded that 20 percent" (Tr. 992).]

31. The documents that were submitted to Security Pacific [to obtain loans from the $500,000 line of credit referred to in Findings 15-18, 25, and 28-30] were prepared by Miss Allwardt, and she was responsible for that part of the operation of the company, although they may have been submitted to the Bank by Mr. Scharf, [and the documents submitted to the bank from April through August 1983 were signed by Mr. Scharf (Tr. 789-91, 960-61, 970-71).]

32. Donald Scharf was a signatory on the checking account of Fresh World, Inc. until his authority was removed by Mr. Dixon on August 6 [or 9], 1983. Mr. Scharf learned of this removal from the signature card at the bank on August 19, 1983. Not knowing that his signature had been removed, Mr. Scharf, between August 6 [or 9], 1983, and August 19, 1983, had signed several checks payable to vendors. When he talked to Mr. Dixon about this he was told that Mr. Dixon was President of the company, and that was the way he wanted it. The bookkeeper was not informed of the removal of Mr. Scharf's authority [, although she was told in August that Mr. Dixon wanted the checks prepared for his signature (Tr. 203-05, 397-99, 409, 413, 674-78).]

33. According to evidence of record, as of August 30, 1983, there were accounts receivable of $689,000.00 [, $523,426.95 of which were "eligible" accounts receivable (CX 13, p. 1, line 10)]; and, there was sufficient money in the account of Fresh World, Inc., to pay the vendors for the produce purchased by Donald Scharf. [Fresh World's loan balance owed to the bank on August 30, 1983, on the $500,000 line of credit referred to in Findings 15-18, 25, and 28-31 was $366,398.37 (CX 13, p. 1, line 19).] When Mr. Scharf was signing checks all of the vendors were paid as the obligations became due [, except that some of his checks bounced after his check signing authority was removed on August 9, 1983 (e.g., Tr. 81-86, 273-74, 318; CX 1, 17, 20).]

34. Mr. Dixon established a new procedure for payment of the vendors [in August 1983]. The checks were to be mailed to him in Larkspur, and then he would sign them and mail them directly to the creditors. However, Mr. Dixon, although receiving them, did not mail [many of] the checks to the creditors [, but about 25 to 50 creditors were paid by Mr. Dixon (Tr. 409, 413, 676-78).] The file containing the unsigned checks is said to be lost.

35. As the evidence clearly shows, times before and after, when produce suppliers were not being paid promptly, the funds of the corporation, Fresh World, Inc., were being depleted by the $70,000.00 withdrawn by Mr. Dixon (as repayment [of the loan referred to in Finding 15]) over the months of March through June or July, 1983. Also, after the removal of Mr. Scharf['s check signing authority], and at a time when the company's books reflected large amounts of unpaid creditors, Mr. Dixon withdrew $20,000.00 for "management" fees, and another $100,000.00 from the operating account of the corporation, (of which others were unaware) which he caused to be deposited in a separate bank account at the First Interstate Bank, subject to his signature, as well as others.

36. On August 30, 1983, $17,447.32 was deposited into the account of Fresh World, Inc., as an advance on the accounts receivable line of credit. On September 13, 1983, $24,135.04 was deposited by Security Pacific Bank into the account of Fresh World, Inc.

37. On August 22, 1983, David Dixon drew a check on the account of Fresh World, Inc., to pay an obligation to Cessna, Inc., for an airplane owned by him. The amount of the check was $7,098.00.

38. A contention, crucial to the position of the Complainant, is that Mr. Scharf "knew", "permitted", or otherwise encouraged a debt accumulation of a Puerto Rico concern by the name of Central Produce, in the sum of approximately $300,000.00; that if Mr. Scharf had not dealt with this concern, or had effectuated payment of its account, then the creditors of Fresh World would have been

paid. It is true that Mr. Scharf was responsible for bringing The Central Produce Co., account to Fresh World, and that the majority of the business transactions were purchase and sale transactions as opposed to brokerage transactions. The extent and nature of Mr Scharf's knowledge of the payment practices of Central Produce was not sufficiently proven by the record evidence. [However, Mr. Scharf admittedly was aware of the large increase in Central Produce's debt while it was happening (Tr. 991).] Also, who were the owners, stockholders, directors, the corporate charter, minutes, etc. of Central Produce were not proven of record by either party, and no findings of fact can properly be made thereto.[36]

[Note: Finding 38(a)–(d) is added by the Judicial Officer]

[38(a) Mr. Scharf brought the Central Produce account to Fresh World as a result of his knowledge of Central Produce before joining Fresh World. Before joining Fresh World in 1982, Mr. Scharf worked for Amigo Foods in 1980 as a buyer and seller of produce (Tr. 806–07). Amigo Foods was owned by Harry Krupnick, and Robert Krupnick also worked there (Tr. 804). Amigo Foods sold produce to Central Produce, but Mr. Scharf was not personally involved in sales to Central Produce (Tr. 806).

[(b) In 1980 and 1981, Robert Krupnick went into business as Watermill Export Company in Scarsdale, New York (Tr. 808–09). Mr. Scharf went with him and worked for Watermill from the time it first started in business (Tr. 809). Watermill had six employees, a controller, three secretaries, Robert Krupnick and Mr. Scharf (Tr. 812–13). Mr. Scharf bought produce for Watermill and Robert Krupnick bought and sold produce for Watermill (Tr. 813). *Mr. Scharf knew that Watermill sold only to Central Produce, i.e., that all of the produce bought by Robert Krupnick and Mr. Scharf was sold to a single customer, viz., Central Produce and its subsidiaries* (Tr. 814). On occasions, when Robert Krupnick was not there, Mr. Scharf would talk to Pepe Fillgara of Central Produce about invoices and merchandise (Tr. 819–20).

[36 The ALJ did not accept Mr. Dixon's testimony that Mr. Scharf told him that Central Produce was partly owned by Mr. Scharf's friend and former employer, Robert Krupnick, who had been the silent 50% owner of North American Produce Distributors with Cameron Dale (Tr. 188–89). Mr. Scharf denied discussing Central Produce's ownership with Mr. Dixon (Tr. 791). Mr. Scharf did, however, admit that when he sold produce for Fresh World to Central Produce, Central Produce at times wanted the transportation handled by Luallipam, and that Robert Krupnick was one of the persons at Luallipam with whom he dealt (Tr. 858–61, 1005–08). Luallipam was located at the same address in Scarsdale, New York, where Watermill (see Finding 38(b), *infra*) had been located (Tr. 859).]

[Mr. Scharf testified that he was "told" that he was vice president of Watermill (Tr. 815), but he wrote to the Department of Agriculture on March 4, 1982, stating that "effective March 4, 1982, I, Don Scharf, am resigning my position as vice president and officer of Watermill Export, Inc." (CX 23).

[Watermill's PACA license was automatically suspended on April 23, 1982, because it failed to satisfy a reparation award issued against it. *In re Watermill Export, Inc.*, 41 Agric. Dec. 1781, 1782 (1982). Mr. Scharf was not aware of that suspension (Tr. 854–55). Subsequently, Watermill's license was revoked on September 16, 1982, because it failed to pay promptly for $828,370.57 worth of produce, $292,265.82 of which remained unpaid (Tr. 811, 854; *In re Watermill Export, Inc.*, 41 Agric. Dec. 1781, 1781–82 (1982)). Mr. Scharf testified (Tr. 993):

> A. I didn't know exactly why Watermill went under because I was here in California when I read in the Packer [a trade magazine] about Watermill. I didn't know anything about what was happening as far as their financial problems.

[(c) After leaving Watermill in March 1982, Mr. Scharf was engaged in April 1982 by Steven L. Gilfenbain to do a feasibility study of going into the gourmet-type food operation in California (Tr. 815, 831–32). While working in California, Cameron Dale came to see Mr. Gilfenbain about a trucking project, and he also visited with Mr. Scharf (Tr. 833). Cameron Dale and Mr. Scharf knew each other many years previously (Tr. 832–33). Cameron Dale mentioned to Mr. Gilfenbain that there was an opening at Fresh World, Mr. Gilfenbain passed the information on to Mr. Scharf, and Mr. Scharf contacted Terry Allen of Fresh World, which resulted in his affiliation with Fresh World (Tr. 834–39). (This is the same Cameron Dale who interested Mr. Dixon in Fresh World.)

[(d) About three weeks after Mr. Scharf went to Fresh World, he began buying and selling produce for Fresh World (Tr. 852–56). He called people he had previously known through his prior employment. Pepe Fillgara of Central Produce was one of the first persons he called (Tr. 855–56, 863–64). Fresh World had not previously dealt with Central Produce (Tr. 856).

[Central Produce soon became Fresh World's largest customer. By December 1982, Central Produce received about 40% of all the produce sold by Fresh World (Tr. 895, 994). In 1983, Central Produce continued to receive about 40% of all the produce sold by Fresh World (Tr. 979–80, 994). Mr. Scharf made the majority of the sales to Central Produce, although Jeff Leonard made some (Tr.

752). (Central Produce's letter of January 18, 1984, referring to settlement discussions states that "Don Scharf" must be included in any settlement conversation "[s]ince it was he that we dealt with" (CX 14; Finding 40, *infra.*)

[Mr. Scharf told Mr. Dixon that Central Produce was a good receivable, and that based on previous experience, Central Produce had paid their bills (Tr. 160, 991–93).

[(e) Mr. Scharf is currently operating H & J Brokerage as a sole proprietorship, with a PACA license. He is not doing any business as a dealer, i.e., he does not take title to any produce. He operates solely as a broker. (Tr. 1016–17, 1024–25). He currently does brokerage business with Central Produce (Tr. 1017, 1024). Although he does not now operate as a dealer, Mr. Scharf would like to operate as a dealer if his license application is accepted (Tr. 1032).]

39. By July 31, 1983, Central Produce owed Fresh World an amount of $283,000.00, an increase from $42,000.00 which it owed in January, 1983. [By September 6, 1983, Central Produce owed Fresh World $342,144.66 (CX 12, 2d and 3d pages after cover page).] Mr. Dixon was aware of the large indebtedness owed by Central Produce at least by May, 1983, when it was brought to his attention by Security Pacific, which was lending on the account receivable. Although Mr. Dixon indicates that he told Mr. Scharf to cut back on the sales to Central Produce in June of 1983, this is contradicted by Mr. Scharf. It is reasonable to conclude, on the basis of the record as a whole, that both Mr. Scharf, and Mr. Dixon, as well as Judy, the bookkeeper, knew, could [have] known, or should have known, of the extent of the increasing indebtedness of Central Produce, at least from May, 1983.[3f] It was information readily ascertainable, and, certainly, material to the operation of the company.

40. Central Produce has offered to settle its indebtedness to Fresh World, for the amount of $118,000.00, thus conceding that it owes at least that amount. Fresh World claims that Central Produce owes approximately $340,000.00. David Dixon has refused to discuss this account with any representatives from Central Produce, and in fact, he has refused to communicate with the members of Central Produce. Why greater effort was not made to collect this account is not clear from the record, but it seems that very little effort was directed to collecting it. [However, David Dixon did

[f Central Produce's debt to Fresh World was some $116,000 on May 6; $218,000 on June 10; $153,000 on June 13; $231,000 on July 8; $281,000 on July 15; $329,000 on July 22; $362,000 on July 29; $283,000 on July 30; $327,000 on August 5; $332,000 on August 23; and $342,000 on September 6, 1983 (CX 12).]

take a number of steps to collect the Central Produce debt. He began by writing one or two letters to each debtor, including Central Produce, demanding payment (Tr. 407, 449). Security Pacific Bank then took charge of collecting the receivables, and Mr. Dixon met with them about six times to review their letters and phone calls to Central Produce and other creditors (Tr. 450, 478, 603–09; RX E). Mr. Dixon also had two telephone calls with Pedro Gonzales of Central Produce in January 1984 (Tr. 450–51). But he did not have Mr. Scharf on the line, as requested by Central Produce. Central Produce stated in a letter to Mr. Dixon (CX 14; see, also, RX E, 3d letter):

> We have offered on many occasions to discuss the matter, however, any discussion must be had with those people that handled the sales and purchases. You have promised to contact me on Friday, January 20th, 1984. At that time we can go over the entire matter, however, we will insist that your Mr. Don Scharf be included in the conversation. Since it was he that we dealt with and the fact that you have no first-hand knowledge of any of the surrounding events Mr. Scharf must necessarily be included.

solve the problems as they occurred, through discussions by telephone or Telex with Central Produce, suppliers, and other involved parties. He made some adjustments with Central Produce, and others were pending. (Tr. 897–98, 995–1005).]

41. As set forth herein, and on the basis of the record as a whole, the evidence does not support the allegation, or contention, that Mr. Scharf was solely responsible for the non-payment of the creditors of Fresh World, Inc. However, the evidence does disclose that such non-payment did occur at a time when he had significant responsibilities and duties with the company. For instance, he was the principal factor in the corporation commencing to sell to Central Produce—an account which it did not have prior to his coming into the corporation; Mr. Scharf did sign documents which bound Fresh World to Security Pacific Bank with respect to loans and other financial concerns; also, commencing the first part of January, 1983, Mr. Scharf was operating as the chief operating officer, and everyday manager, which included making all decisions regarding [his] purchase[s] and sale[s] of produce, . . . and generally overseeing the activities of other employees. It may have been that Mr. Scharf was [or would have been] powerless to go against the wishes of the corporate owners, as portrayed by either Mr. Allen, or Mr. Dixon [, in those instances where they chose (or could have chosen) to exercise their superior authority.] Mr. Scharf was motivated to keep his job and to show increasing business activity on the part of Fresh World, Inc. However, his close association with this corporation, which did not pay its bills, is sufficient reason for the Secretary to find that the Respondent applicant is unfit to receive a PACA license. His role with Fresh World was not that of an insignificant clerk or employee.

42. The day [after] Labor Day 1983, at a time when Mr. Scharf had traveled East with the knowledge and consent of Mr. Dixon who had advanced him funds to do so, Mr. Dixon closed down the office of Fresh World, Inc., gave termination notices to its employees, had four men come and take the records thereof, and had them removed to Mr. Dixon's warehouse, except for the accounts receivables which he personally took. During his travels East, Mr. Scharf had intended to go to Puerto Rico for the purpose of discussing collection on the amounts due from Central Produce, Inc. During the time Mr. Dixon was closing down the office, and while Mr. Dixon was there, Mr. Scharf called and wanted to speak to Mr. Leonard relative to some new accounts which Mr. Scharf had acquired. It was at that time that Mr. Scharf was advised by Mr. Dixon that he was no longer employed.

43. Although Mr. Dixon withdrew Mr. Scharf's signatory authority at the bank on August 6 [or 9], 1983, Mr. Scharf was unaware until August 19, 1983, that he no longer had authority to sign checks for Fresh World, Inc. His awareness came about August 19, 1983, when he wrote a check to himself [for expenses. He went to the Security Pacific Bank to cash the check, but the bank teller told him that his signature was not authorized (Tr. 793).[3h]

44. Mr. Scharf is untutored with respect to financial statements and he did not become acquainted with Fresh World's records except for the purchasing and payment aspects. There was maintained by him a tickler file which Mr. Scharf monitored to assure that payment to the vendors was made on time inasmuch as the sellers of produce had various times for payment, such as 10, 20, 30 or 35 days.

45. From March 1, 1983 through August 6 [or 9], 1983, when his authority to sign checks was removed, and, the first [part] of September, 1983, when he was dismissed as an employee, Mr. Scharf was employed to buy and sell produce, to manage the affairs of the corporation on a day-to-day basis including overseeing paying the bank, paying the personnel, paying the suppliers, and matters of like nature. Mr. Scharf was to report to Mr. Dixon on a monthly basis by way of financial statements. This was done through June or July, 1983. During this time period there were other employees of Fresh World, Inc. who were buying and selling produce including Mr. Schmidt and Mr. Leonard, each of whom handled his own account and was responsible for all aspects thereto.

46. *The evidence is undisputed that from and after August 6 [or 9], through September, 1983, Mr. Scharf did not have authority to sign checks and pay the bills.* However, he still had authority to buy and sell produce, and he did. A procedure was worked out whereby the bookkeeper was to make up the checks, give or send them to Mr. Dixon, who was supposed to either send them back to Fresh World's office for forwarding or was suppose[d] to sign the checks himself and put them in the mail. Utilizing this procedure, a number of the accounts for which the bookkeeper had written checks and sent to Mr. Dixon for signature and mailing never received the checks.

47. Mr. Scharf did not have control over the circumstances that caused the non-payment of the majority of the produce creditors

[3h Mr. Dixon testified that he told Mr. Scharf on August 5 or 6, 1983, that his name was removed as a person authorized to sign checks on Fresh World's account (Tr. 386-99), but the ALJ apparently did not believe the testimony, which was contradicted by Mr. Scharf (Tr. 793).]

listed in the Notice to Show Cause [, except to the extent that the Central Produce debt resulted in such nonpayments.] A vast majority of the 85 transactions set forth in Paragraph VI of the Notice to Show Cause became due and payable at a time subsequent to August 6, 1983.[4] There are a number of other accounts which became due at dates prior to August 6, 1983. Although some of these accounts were due in either June or July, 1983, they were of relatively small amounts and some of them may have been the subject of dispute. Using a 10-day payment due date [which is not entirely accurate (see note 4)], or as set forth in the Notice to Show Cause, amounts which would have been due and owing prior to August 6, 1983, were:

Transaction	1.	-	$3,257.10	
	2.	-	3,948.00	
	10.	-	1,016.20	
	19.	-	2,834.50	
	20.	-	2,834.50	
	21.	-	2,834.50	
	22.	-	2,834.50	
	23.	-	2,834.50	
	41.	-	3,656.70	
	44.	-	8,000.00	(August 3, 1983)
	45.	-	8,000.00	(August 3, 1983)
	46.	-	7,484.00	(August 4, 1983)
	47.	-	1,380.00	(August 5, 1983)
	49.	-	3,335.00	(August 5, 1983)

48. Between August 6, 1983, and August 19, 1983, Mr. Scharf signed a number of checks which were subsequently returned because he did not have signatory authority. It is not shown on the record whether any of the above transactions were among them or if any of such transactions were the subject of dispute. An example of a returned check is Exhibit 20 to Oneonta Trading Corp. and Respondent's Exhibit A for $1,900.00.

49. There can be no question that from August 6 [or 9], 1983, the only individual, according to the evidence in this case, to have authority to sign the checks and to give instructions as to how the payment procedure was to be done, was Mr. Dixon.

[4] These payment due dates set forth in the Notice to Show Cause may not coincide with the actual practice and payment procedures by Fresh World, Inc.; *for the purposes of this proceeding, the Complainant has not challenged the payment practices of Fresh World, Inc. wherein it paid its accounts at intervals ranging from 10 to 35 days.*

With respect to those accounts which fell due prior to August [illegible] 1983, (assuming that these are proper due dates), the responsibility for the non-payment thereof must be weighed in light of the evidence. Once Mr. Dixon went to the bank [5] and withdrew Mr. Scharf's signatory authority capabilities, although Mr. Scharf was not so informed and he continued to sign checks after that date for Fresh World, Inc., some of which were returned for lack of authority to sign the checks, Mr. Scharf could not have paid creditors if he had wanted to. Mr. Dixon's activities in Fresh World, Inc. at this time were of such magnitude that he had to be well aware of what was occurring financially; on the other hand, Mr. Scharf was not. He was under the impression that there was plenty of money to pay the creditors based on the volume of business which Mr. Dixon and other employees were generating. Accordingly, he never inquired about the availability of funds for payment to the suppliers. However, Fresh World's monthly financial statements (for which Mr. Scharf provided data (Tr. 456), looked at (Tr. 981–83), and discussed with Mr. Dixon (Tr. 170–78, 981–83)) show that the funds were largely coming from the $500,000 line of credit referred to in Findings 15–18, 25, 28–31, and 36. Specifically, Fresh World borrowed on the bank on the line of credit about $185,000 on April 30 and [illegible] (CX 8, p. 3; CX 9, p. 3), and about $357,000 on July 31, 1983 [illegible] p. 2). Moreover, prior to September 1983, Mr. Scharf signed the documents obtaining the loans from the bank which showed the total loan balance (e.g., CX 13, p. 1, line 19; Tr. 789–91, 960–61, [illegible]). For example, Mr. Scharf signed the loan document on [illegible] August 31, 1983, showing the loan balance of $366,398.87 (CX 13, p. [illegible] dated June 19).

3. The Complainant has taken the position by reason of the fact that Watermill, Inc. had as one of its customers, or as its only customer, Central Produce, Inc., a concern operating out of Puerto Rico, and because Central Produce became a customer of Fresh World, Inc. after the employment of Mr. Scharf, that this entitled the Complainant to bring into issue the alleged non-payment of suppliers by Watermill. This was not alleged in the Complaint and was not a matter upon which the Respondent was given notice prior to the hearing. Also, the Complainant cites no cases which entitled it, without notice, in a Notice to Show Cause proceeding, to determine the responsibility for non-payment of debts of another corporation on the sole basis that there was a common purchaser with Respondent. Moreover, the evidence sought to be adduced, and [illegible].

[5] This is indicative of Mr. Dixon's ownership authority and Mr. Scharf's non-au-

relied upon by Complainant, is not sufficient proof that Mr. Scharf was responsible for any violations by Watermill.

52. Robert Krupnick and his company, Watermill Export, Inc., were suspended from employment in the produce industry for failure to pay produce creditors. In this connection, agreement is reached with the contentions of the Respondent that the reason for failure to pay the produce creditors was not proven in this proceeding, and even if the Complainant's offer of proof had been admitted, it is insufficient to establish that such failure was caused by the customer, Central Produce, and/or the Respondent [or, rather, Mr. Scharf], who worked for Watermill as a buyer of produce.

53. At the oral hearing certain proferred evidence concerning the company "Watermill" was excluded because it was not alleged in the Notice to Show Cause as being a reason why a PACA license should be denied to Respondent. Moreover, Complainant's proof would not have shown facts which would have supported its conclusions drawn from "simple fact" and things being, "virtually inconceivable". It is upon this latter description that the Complainant relies for its statement that "It is virtually inconceivable that Mr. Scharf did not act as a seller of produce to [for] Watermill as well as a buyer from various customers". Reliability of this statement without proof cannot be granted. The evidence proferred herein is not sufficiently reflective of the financial picture of Watermill from which correct conclusions can be drawn.

54. The allegations of Paragraph 8 of the Complaint are most easily resolved. The evidence clearly shows that the records of Fresh World, Inc., were removed from the business premises by Mr. Dixon, or persons unknown. Respondent removed nothing. This is uncontroverted by the evidence. Therefore, paragraph 8 should be, and hereby is dismissed.

55. There has been a scarcity of evidence in this proceeding relative to numerous matters, such as who knew whom, and the relevance of such relationship, if any; and the financial status, according to generally accepted accounting practices, of Fresh World, Inc., at any given time.

56. The evidence in this case is insufficient to make a determination as to who were the owners of Central Produce.

57. The evidence is also insufficient in regard to transportation costs of the produce which was purchased for movement to Puerto Rico which obviously had to move over land, mostly by trucks, and picked up at a port of embarkation by a shipping and forwarding firm.

58. A disciplinary complaint was filed against Fresh World, Inc., on April 10, 1984, PACA Docket No. 2-6526, and a default Decision

issued thereon [finding that Fresh World "has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b)" (*In re Fresh World, Inc.*, 43 Agric. Dec. ____ (Oct. 4, 1984).]

59. Reparation awards have been granted by the Secretary of Agriculture to several of Fresh World, Inc.'s produce suppliers.

CONCLUSIONS

The granting or withholding of a license is a matter committed to the Secretary's expertise and discretion and is entitled to deference in the absence of violation of Constitutional, statutory, regulatory, or other legal mandates or restrictions.

By reason of the above findings of fact, it is concluded that:

a. Donald Scharf, a former employee, and, at least on paper, "President" of Fresh World, Inc. [at one time, and later "General Manager"], has engaged in practices of a character prohibited by the Act; and

b. Because Donald Scharf is president of and a holder of 75 percent of the outstanding stock of Respondent, H & J Brokerage, Inc., the Secretary of Agriculture may withhold the issuance of a license to Respondent.

Section 4(d) of the Act (7 U.S.C. 499d) reads in pertinent part:

> ". . . . If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, ... or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act the Secretary may refuse to issue a license to the applicant."

Section 2 of the Act (7 U.S.C. 499h) lists the practices prohibited under the Act:

> "It shall be unlawful in or in connection with any transaction in interstate or foreign commerce
>
> * * * * * * *
>
> (4) For any commission merchant, dealer, or broker to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had;"

The Act provides the framework by which the Secretary of Agriculture can regulate business practices in the perishable agricultural commodities industry. Essential to that regulation is the procedure outlined in Section 4(d) whereby the Secretary may question the fitness of any particular applicant for a license to conduct business in the perishable agricultural commodities industry. In the case of a corporate applicant, the inquiry into fitness extends not only to the corporate entity itself, but also to the principals of the corporation; specifically extending to an officer, director, or holder of more than 10 percent of the outstanding stock of the corporation. The inclusion of this level of inquiry into fitness, of course, recognizes that corporate activity is initiated by those persons who control the corporation.

Similarly, section 4(d) of the Act authorizes the Secretary to withhold the issuance of a license when a person who is responsibly connected with the applicant has engaged in practices of the nature prohibited by the Act. Hence, if there is evidence that a person responsibly connected with the applicant has engaged in a prior course of conduct which included practices of the nature prohibited by the Act, then that person should be restrained in his methods of doing business in the perishable agricultural commodities industry in order to protect those members of the industry who can and do conduct their business in accordance with the dictates of the Act. Donald Scharf was President for a time, as well as a responsible employee of Fresh World, Inc. and because Fresh World, Inc. did not, and has not, paid, truly and fully its creditors, such non-compliance with the Act renders the applicant unfit to engage in the business of dealing in perishable agricultural commodities in interstate or foreign commerce as a commission merchant, dealer, or broker.

As stated more fully in the Findings of Fact, Fresh World, Inc. engaged in practices of a nature prohibited by the Act. Fresh World, Inc. was a licensee under the Act, and violated section 2(4) of the Act by failing to account truly and correctly and make full payment promptly to the sellers of produce.

Under section 4(d), the Respondent-applicant is given the opportunity to "show cause why the license should not be refused". If the applicant fails to present sufficient evidence to prove its fitness to hold a license, then the Secretary is justified in refusing the issuance of the license. Complainant has established that Fresh World, Inc., with which Mr. Scharf was responsibly connected [, i.e., connected in a responsible manner with the violations], has engaged in a practice of a character prohibited by the Act.

The extent of responsibility for the non-payment of Fresh World's creditors is not exclusively with Mr. Scharf, as can be seen by the activity and withdrawals of corporate funds by others associated with the corporation. Even assuming that Mr. Scharf's remuneration was as stated by the Complainant, there is no showing that this was excessive when viewed in light of the business he generated, and the activities he engaged in. No case has been brought to my attention where a future applicant is denied a license because of a nonadjudicated determination of "responsibly connected." Complainant avoids this by making the "knowing" or the "permitting" of unpaid accounts by the Central Produce account as a basis for the denial of a license. However, as a result of the evidence adduced in this proceeding, it is more than evident that Mr. Scharf actively participated in the corporate affairs of Fresh World, Inc., even though he may not have been responsible for all of its activities.

This is a very close case as to who was responsible for the non-payment of creditors, but Mr. Scharf was associated and closely involved with the operations of Fresh World, from June, 1983, through August 6 [or 9], 1983, when he could no longer sign checks, and until September, 1983, when he was dismissed as an employee. The documentation is not sufficiently complete to determine whether or not, if all the accounts receivables had been collected, and if withdrawals from the corporation had not occurred, the creditors could, or would, have been paid in full [, but I infer that they would have been fully paid]. However, all things considered, and from an evaluation of the entire record evidence, I find and conclude that the Secretary had sufficient and reasonable basis for refusing a license to the Respondent. Accordingly, I find that the evidence establishes that, as that term is used in the Act, Respondent is "unfit" to receive a PACA license.

By reason of the occurrences set forth in the above stated Findings of Fact, the financial status of Fresh World, Inc., from October, 1981, through September, 1983, was affected by the following transactions:

1) Although Mr. Faulkner was running the business on a day-to-day basis, others of the original incorporators may have been receiving consulting fees. There is evidence that Mr. Cameron Dale had a "consulting agreement" which was not reduced to writing and any amounts which may have been paid thereunder are not evident on the record.

2) Karl Allen caused to be withdrawn from the corporation an amount of $40,000.00 and still retained his 25%

> ownership, which he subsequently tried to sell for $50,000.00. The original 75 shares of stock belonging to others than Karl Allen apparently were never surrendered to the corporation, and later became the object of purchase [or, rather, acquisition] by Mr. Dixon.

Also, without corporate books and records, such as audited profit and loss statements and balance sheets, normally maintained, it cannot be ascertained from this record what occurred, as it might affect the corporate structure when Mr. Faulkner left the business. Supposedly, he would have transferred his stock back to the corporation. Whether there was any consideration, other than a release from liability by the bank is not known.

Therefore, at the conclusion of the first 14 or 15 months of its existence, an amount coinciding with the entire capitalization of Fresh World, Inc., had been depleted. Mr. Scharf first became associated with the corporation as a consultant the latter part of June, 1982, and three months later, became a regular employee. During December, 1982, or January, 1983, Mr. Karl Allen withdrew the amount of $25,000.00 from the corporation, which is a part of the $40,000.00 mentioned above. There is no evidence that Mr. Scharf knew, or had any control over this withdrawal. The check was signed by Terry Allen, Mr. Karl Allen's brother.

Mr. Dixon indicated that the initial $70,000.00 which he utilized to [loan to] Fresh World, Inc. consisted of corporate funds from Food Source, Inc. for which Food Source, Inc. issued a check for $50,000.00 in January, 1983, and another check for $20,000.00 in February, 1983. Food Source, Inc. acquired no promissory notes for the transfer of the $70,000.00 from Food Source, Inc. to Fresh World. Food Source's books did not reflect either a separate loan to Fresh World nor did it carry Fresh World's stock in its capital asset account. With respect to this transaction, its books showed nothing. The implications of this are not explored herein and although Mr. Dixon was 100 percent owner of Food Source, Inc., according to the testimony of Karl Allen, he was only a 75% owner of Fresh World, Inc.

Mr. Dixon's own testimony indicates that the initial $70,000.00 advanced for the [loan to] Fresh World from Food Source was repaid over a period of months and his testimony reflects that by the end of July, 1983, the initial advance had been repaid.

In addition, as set forth herein, Mr. Dixon withdrew $120,000.00 from the corporation, Fresh World, Inc., at a time when it had unpaid creditors. According to Mr. Dixon's testimony, in August, 1983, he caused the disbursement of corporate funds from Fresh World in the total amount of $120,000.00; $20,000.00 of which he al-

located to himself to cover the cost of management and wrote four checks to Food Tech Corp. for $100,000.00 [, to be held to settle with the Security Pacific Bank on the line of credit (Tr. 234–35, 490–91)]. Food Tech was not the guarantor of Fresh World at the bank; Food Source and Mr. Dixon were.

The above mentioned facts take on significance, because the Complainant would have us believe that the creditors of Fresh World Inc., were not paid solely because of what Mr. Scharf did or did not do. Such an approach ignores the amounts withdrawn from the corporation by its owners.

The findings and conclusions herein have been premised upon a consideration of the entire record evidence, including an evaluation of the credibility of witnesses. However, there is a paucity of reliable evidence as to the corporate structure and activities of a number of corporate entities referred to, including Central Produce; North American Produce Distributors; and Luallipam.

Notwithstanding the various assertions of the parties, I find the evidence inconclusive and not sufficient to furnish a basis for determining who owned and controlled Central Produce. Ownership and control can be proven in many competent ways, including a copy of the corporate charter, minutes, financial statements, etc. This was not done.

From the evidence presented, an unresolved question in this case, and one upon which there is little credible evidence, is that of why greater effort was not made by the owners to effectuate payment from Central Produce. The dramatic increase in indebtedness from $42,000.00 to over $300,000.00 was not unknown, and although there is some evidence that a few statements were made to Mr. Scharf concerning the same, apparently greater effort was not expended. At the time that the Bank removed this account from its security portfolio, this indeed was an indication of the potential peril which this overdue account presented to Fresh World.

For whatever reasons, and the reasons are not clear on the record, the outstanding balance of Central Produce was allowed to increase to over $300,000.00 as of September, 1983, from approximately $97,000.00 in March, 1983, with, at best, only half-hearted attempts by the principals of Fresh World to collect the balance due, and some such attempts were made after September 6, 1983. However, the record does show that approximately $50,000.00 on account was received from Central Produce on or about August, 1983. There is also evidence of record that employees of the Bank considered the Central Produce account receivable as "good" and

could be collected—"They are a strong company."—and that credit reports so indicated [(Tr. 766-67).[5a]]

On Brief, Complainant continues to advance its "very determined position" that an employee of Security Pacific was incompetent to give testimony relating to the status and security aspects concerning an account, and the collection of same, over which the Bank had assigned him. The Complainant's many objections were overruled at the time of the oral hearing, and I believe rightly so. Fresh World had a substantial line of credit from the Bank, and, as security therefor, the Bank had taken the accounts receivable of the Company, which included the account of Central Produce, which constituted a substantial portion of the accounts receivable until it was removed as an ineligible account. At issue here is why the creditors of Fresh World were not paid—and if that was the fault of Mr. Scharf, to such a degree that he should be denied a license. Certainly, details concerning the servicing, status, and collection efforts of the Bank are relevant and material to this case.

If Complainant believes Mr. Red's testimony to be incorrect, it could have so shown by competent evidence. Complainant recognizes the importance of the Central Produce account to the nonpayment of the produce creditors—" * * * the whole difficulty was that the Central Produce account had not paid $342,000. * * *". This was of no less importance to the Bank which eventually removed Central Produce from the eligible security. To take a position that Mr. Red, a banking official, with assigned duties over this account, "* * * was not connected with, nor interested in, the payment of the amount due and owing [from] Central Produce and [to] Fresh World * * *" is unrealistic, as the Bank anticipated and intended to be paid, even if it had to resort to legal action.

The evidence was received not for the purpose of showing that Mr. Red knew "* * * exactly what was happening between Central Produce Corporation and Mr. Dixon on behalf of Fresh World", but rather, *for the purpose of showing what information the Bank had* with respect to the accounts receivable, which were the Bank's security.

Complainant's position, more clearly set forth in its Reply Brief, emphasizes that it does not assert, nor does it maintain that there

[5a The bank testimony, should, however, be evaluated in the light of the fact that Mr. Dixon had previously testified (Tr. 489):

> A. We plan to assert a claim against Security Pacific Bank on behalf of the corporation that they were negligent in granting the credit against the receivables in the first place and in effect induced myself, Food Source and Fresh World, Inc. to borrow those funds when to do so was not prudent.]

was a conspiracy between Mr. Donald Scharf and other persons to deprive produce creditors of money that is due them.

Complainant's allegation is that Mr. Scharf knew of the problems of dealing with Central Produce Company in Puerto Rico because of prior associations with persons and a corporation which had dealt with Central Produce.

The allegation of the Complaint is to the effect that during the relevant period Donald Scharf:

> "* * * sold to Central Produce Corp., San Juan, Puerto Rico, substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp., to Fresh World, Inc., of more than $300,000.00 to accrue. * * *"

The above mentioned allegation of the Complaint goes beyond the subsequent position of Complainant on brief, i.e., the difference between "permitting an indebtedness" and "(knowing) of the problems of dealing with Central Produce Company".

The principles set forth in the case cited by the Complainant, namely, *In Re: Ludwig Casca*, 34 A.D. 1917 (1975), are applicable herein. The denial of a license is not to be regarded as a penalty imposed on the applicant, but rather a means whereby the Secretary protects the public interest. If the corporate respondent herein were to be granted a license, the public will be dependent upon Mr. Scharf to fulfill the responsibilities under the Act, albeit through a corporation. Under the terms of the Act, the Secretary *may* withhold the issuance of a license under circumstances where he finds that the applicant is unfit to engage in business as a licensee. To adopt the Respondent's view would be to accept the proposition that Mr. Scharf had absolutely nothing to do with the non-payment of creditors, and, the financial difficulties of the corporation, Fresh World. As I noted above, I do not believe that Mr. Scharf was solely to blame for the non-payment of creditors, but he indeed was more than nominally involved in the business transactions of Fresh World. Although the determination of who is responsibly connected with a corporation is subject to an administrative hearing and decision, this does not preclude an examination of the circumstances in this Notice to Show Cause proceeding as to the correctness of the Secretary's determination that the corporate applicant is unfit to be licensed under the Act.

The goal of the Perishable Agricultural Commodities Act is that only financially responsible persons should be employed in the business subject to the Act.

The concept that the corporation is a distinct entity, even when wholly owned by a single individual, is designed to serve normal, inoffensive uses of the corporate device and is not to be stretched beyond its reason and policy. The Respondent's reliance on *Quinn* vs *Butz*, 510 F2d 743 (C.A.D.C., 1975) does not preclude the result in this case. Mr. Scharf's officership [and, later, service as General Manager] was not purely nominal, and he did participate on an extensive basis in the management, on a day-to-day basis, of the business activities of Fresh World. Thus, this is a different situation than was present in such cases as *Minotto* vs *U.S.D.A.*, 711 F2d 406 C.A.D.C., 1983) where the Court in reversing a "responsibly connected" determination found that the petitioner therein was a "nominal" director to whom knowledge of the violations could not be imputed—essentially, the litigant therein was a clerical employee.

Mr. Scharf's association with Fresh World was not a passive one—as he indicated with respect to Exhibit C, although he did not have the responsibility of filling the form out (Miss Allwardt did), "The responsibility that I had was that my signature had to be affixed to the bottom of the sheet in order for the bank to accept it." (Tr. 790). This is reflective of executive responsibility—it would be unusual for corporate officers of a large business concern to personally sit down and compile the figures, reports, etc. This is usually done by clerical help and others.

He also signed a Security Pacific Note, and had a signature authorization and corporate resolution to obtain credit.

Even if Mr. Scharf was under the ultimate control of Mr. Dixon, the total circumstances of this case are such that he can not be absolved from the consequences of non-payment to the creditors of Fresh World, Inc., for produce which they supplied.

As set forth herein above, a disciplinary Complaint was filed against Fresh World, Inc. on April 10, 1984, by the Secretary, in PACA Docket No. 2-6526. By reason of official notice thereof, it is ascertained that no answer was filed thereto, and that the allegations of the Complaint contained assertions that during the period June, 1983, through September, 1983, Fresh World, Inc. violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce. By reason of the admission of such facts by failing to file an answer thereto, a default decision was issued on October 4, 1984, which became final on November 16, 1984.

The officers and stockholders [and General Manager] of Fresh World, Inc., engaged in practices of the character prohibited by the PACA, and the Respondent/Applicant is unfit, as that term is used in the Act, to be licensed under the PACA. If this is a harsh result, then too, are the undeniable facts that, even as late as the oral hearing, there remained unpaid numerous produce suppliers who had furnished produce with the expectation of being paid. They were not.

An evaluation of the record as a whole establishes that the Secretary did not act illegally in denying the applicant a license under the Perishable Agricultural Commodities Act. The many and varied contentions of the parties have been carefully considered. Any motions, requests, or otherwise which have not been ruled upon, and which are inconsistent with this Decision, are hereby denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent argues (correctly) on appeal that Mr. Scharf was not "responsibly connected" (as defined in the Act) with Fresh World during the period that Fresh World failed to pay for produce. The term "responsibly connected" is defined as follows (7 U.S.C. § 499a(9)):

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. . . .

However, the Secretary's authority to refuse a license to respondent arises under § 4(d) of the Act (7 U.S.C. § 499d(d)), quoted in the Preliminary Statement (*supra* pp. 5-6). That section does not use the term "responsibly connected." Under § 4(d) of the Act, the Secretary may refuse to issue a license to an applicant that is "unfit . . . because . . . any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this [Act]" (7 U.S.C. § 499d(d)). Since Mr. Scharf is admittedly president and treasurer and a 75% stockholder of the applicant, the Secretary may refuse to issue a license to respondent if it is unfit because Mr. Scharf "engaged in any practice of the character prohibited by [the Act]."

Although the "responsibly connected" definition in the Act and the cases cited by respondent construing the term "responsibly connected" are irrelevant in this case, it is worth mentioning briefly

(for the benefit of a reviewing court) under what circumstances a "responsibly connected" determination is relevant. Section 8(b) of the Act provides (7 U.S.C. § 499h(b)):

> (b) *Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties*
>
> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—
>
> (1) whose license has been revoked or is currently suspended by order of the Secretary;
>
> (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
>
> (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.
>
> The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Scretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a

> reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

Under § 8(b) of the Act, just quoted, since Mr. Dixon was "responsibly connected" with Fresh World, which was found to have committed flagrant and repeated violations of 7 U.S.C. § 499b (Finding 58), no licensee could employ Mr. Dixon without the approval of the Secretary, and such approval could not be given until one year after the issuance of the Fresh World decision, and then only if the licensee furnished a satisfactory bond. After 2 years, the Secretary could approve Mr. Dixon's employment without a bond.

The term "responsibly connected" is also used in granting the Secretary authority to refuse a license under conditions not relevant here. Specifically, § 4(b) of the Act, not involved here, provides (7 U.S.C. § 499d(b)):

> (b) *Refusal of license; grounds*
>
> The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is a person who, or is or was responsibly connected with a person who—
>
> (A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;
>
> (B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;
>
> (C) within two years prior to the date of the application, has been found guilty in a Federal court of having violated the provisions of sections 491, 493 to 497 of this title, relating to the prevention of destruction and dumping of farm produce; or

> (D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 499g(c) of this title, to pay any reparation order issued against him within two years prior to the date of the application.

The inclusion of the "responsibly connected" criterion in § 4(b) of the licensing section of the Act, just quoted, while omitting the term in § 4(d) of the licensing section of the Act (which is applicable here), emphasizes that the "responsibly connected" criterion should not be implied in the place at which it was omitted. *Lang* v. *Comm'r of Internal Revenue,* 289 U.S. 109, 112 (1933); *Corn Prods. Ref. Co* v. *Benson,* 232 F.2d 554, 562 (2d Cir. 1956). Hence the fact that Mr. Scharf was not "responsibly connected" with Fresh World within the meaning of the Act is irrelevant.

The issue here is whether Mr. Scharf "engaged in any practice of the character prohibited by [the Act]" while he was General Manager of Fresh World (7 U.S.C. § 499d(d)). In order to make that determination, it is necessary to know what type of payment practices are prohibited by the Act, so that we can determine whether Mr. Scharf engaged in practices of that "character".

The Act has been interpreted in a very tough and harsh manner, with the overwhelming support and approval of the industry.[6] See, *e.g., In re B.G. Sales Co.,* 44 Agric. Dec. ____ (Oct. 9, 1985), attached as an Appendix to this decision. A licensee which fails to pay for produce has its license revoked, irrespective of excuses (or if it has no license, a finding is made that it engaged in repeated or flagrant violations of the Act, which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation),[7] since "the Act calls for payment—not excuses." [8] In fact, if the pleadings or bankruptcy papers of which of-

[6] As stated in H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2:

> The law has fostered an admirable degree of dependability and fairness in this industry. . . . In spite of the strictness of some of the provisions of the law, the act and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support.

[7] *In re V.P.C., Inc.,* 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.,* 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.,* 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.,* 34 Agric. Dec. 700, 750-51 (1975), *aff'd,* 549 F.2d 830 (D.C. Cir.), *cert. denied,* 434 U.S. 920 (1977).

[8] *In re B.G. Sales Co.,* 44 Agric. Dec. ____ (Oct. 9, 1985) (non-payment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.,* 42

Continued

ficial notice is taken show that a licensee has failed to pay for an amount of produce that is not *de minimis* (and there is no dispute as to whether payment was due), the licensee is not even afforded an opportunity for a hearing to give excuses as to why payment was not made.[9]

Agric. Dec. ____ (Oct. 6, 1983) (non-payment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (non-payment because another firm failed to pay respondent $248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (non-payment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (non-payment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (non-payment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (non-payment because of bankruptcy of another firm owing respondent $776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (non-payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (non-payment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (non-payment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (non-payment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafesak*, 39 Agric. Dec. 683, 685-86 (1980) (non-payment because of strike and failure of others to pay respondent), *aff'd* (unpublished), 673 F.2d 1329 (6th Cir. 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (non-payment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (non-payment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (non-payment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (non-payment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over $130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (non-payment because of financial difficulties).

[9] *E.g., In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. ____ (Apr. 8, 1986); *In re Top Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. ____ (Jan. 27, 1986); *In*

Continued

As in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored in determining violations or sanctions under the Perishable Agricultural Commodities Act since "the Act calls for payment—not excuses.[10]

In affirming the Department's refusal to consider mitigating circumstances in failure to pay cases under the Perishable Agricultural Commodities Act, the court held in *Finer Foods Sales Co.* v. *Block*, 708 F.2d 774, 781–82 (D.C. Cir. 1983):

> The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment—not excuses.' " *Quoting In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980). See also *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).
>
> The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. § 499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S.Rep. No. 2507, 84th Cong., 2d Sess. (*citing* H.Rep. No. 1196, 84th Cong., 1st Sess.), *reprinted in*

re B.G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. ____ (Oct. 7, 1985); *In re Veg-Mix, Inc.*, 44 Agric. Dec. ____ (Aug. 21, 1985), *appeal docketed*, No. 85-1771 (D.C. Cir. Nov. 22, 1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. ____ (Aug. 21, 1985), *appeal docketed*, No. 85-1590 (D.C. Cir. Sept. 19, 1985).

[10] *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (delayed payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1139-40 (1981); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167-68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons.*, 34 Agric. Dec. 120, 130-31 (delayed payment because of uncollectable accounts), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

1956 U.S. Code Cong. & Ad.News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982):

> Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers.
>
> *Quoting In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 720 (1978).
>
> In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick* v. *Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) *quoted in Marvin Tragash Co.* v. *United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).
>
> The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

As shown in the cases cited in note 8, *supra*, the excuse frequently made by a licensee which fails to pay for produce is that another firm failed to pay the licensee. But that excuse has always been rejected. As stated in *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158 (1983):

> Respondent contends that its violations were caused by the failure of Eicaar Export Company, Inc., to pay respondent $248,805.66. Notwithstanding respondent's many efforts to assure itself that Eicaar's ever increasing indebtedness would be paid in full, any seller extending credit on such a large scale to a single firm is taking a calculated risk, at the expense of the seller's suppliers, if the seller is unable to withstand a loss equal to the single firm's indebtedness.

In the present case, Mr. Scharf engaged in practices that led to the failure of Fresh World to pay for at least a large part of the produce involved in Fresh World's payment violations, albeit Mr. Scharf was not the only person connected with Fresh World who engaged in such practices. Mr. Scharf was General Manager of Fresh World (Finding 25). He selected Central Produce as a customer for Fresh World (Findings 38, 38(a)-(d)). He is the one who sold the great bulk of the produce to Central Produce (Findings 38, 38(a)-(d)). He was aware of the tremendous increase in Central Produce's debt to Fresh World while it was happening, i.e., while it was increasing from $42,000 to $342,000 (Findings 38, 39). He knew that Watermill sold only to Central Produce, and that Watermill went broke, but he made no effort to inquire as to whether Watermill went broke because Central Produce failed to pay for merchandise (Finding 38(b)).[11]

Although the record does not show whether Central Produce, which offered to settle the $342,000 debt for $118,000, was entitled to legitimate adjustments with respect to the produce (see Finding 40), in any event Mr. Scharf personally made at least the great bulk of those sales that proved catastrophic to Fresh World.

Respondent argues that Mr. Dixon was solely responsible for Fresh World's failure to pay suppliers, and respondent goes so far as to argue that Mr. Dixon planned from the beginning to withdraw from Fresh World and misappropriate its funds. However, the record does not support respondent's contention. I infer from the totality of the factual situation that Mr. Dixon took over Fresh World in good faith, risking $500,000 of his own money and that of his corporation (Food Source, Inc.) in providing needed capital for Fresh World (Finding 16), and that he took measures to protect his own interests (at the expense of suppliers) in the summer of 1983 only because the profits predicted by Mr. Scharf did not develop, and he was concerned about his large financial exposure and the tremendous debt owed by Central Produce.

Moreover, even though Mr. Dixon took protective measures (to himself) at the expense of suppliers, if the $342,000 had been available from Central Produce, Fresh World's suppliers could have been paid. Accordingly, Mr. Scharf's practices (which led to most, if not all, of the $342,000 Central Produce debt) caused suppliers not to be paid for their produce.

[11] Whether Watermill's failure was caused by Central Produce is not vital to complainant's case. In fact, the record does not explore the reasons for Watermill's financial failure. But a prudent salesman would at least have inquired as to whether Watermill's financial failure was caused by Central Produce's failure to pay Watermill.

The facts here are analogous to those in *In re Golden West Wholesale Fruit Distributors, Inc.*, 36 Agric. Dec. 1591 (1977), in which Golden West's license application was denied because Paul Gitmed, president and 50% stockholder of Golden West, had previously engaged in practices of a character prohibited by the Act when he was an employee of C&M Citrus Distributors, Inc. (C&M). Paul Gitmed was not "responsibly connected" with C&M, within the meaning of the statutory definition, but he was the employee who actually managed C&M's fruit department, and he prepared false entries on slips of paper that were utilized by the bookkeeper to pay consignors. In *Golden West* it is stated (36 Agric. Dec. at 1595-97, 1599):

> Respondent argued at the hearing and in its brief that Section 4(d) grants authority to withhold a license pending a hearing only if Paul Gitmed was "responsibly connected" with C&M. Because Paul Gitmed was not "responsibly connected" with C&M at the time violations occurred, respondent argues that a license cannot be denied.
>
> However, we see no merit in this argument, since Section 4(d) simply provides that a license may be withheld if the applicant (here respondent, Golden West) or one (Paul Gitmed) responsibly connected with the applicant (not some other licensee such as C&M) has engaged in any practice of the character prohibited by the Act.
>
> The issue of responsible connection has bearing only on the question of whether the person who committed the unlawful practices was responsibly connected with the applicant (Golden West in this case). By respondent's own admission, Paul Gitmed is the president and 50 percent shareholder of the respondent-applicant. As can be seen from the express language of section 4(d), there is no requirement that a person who has engaged in practices of the nature prohibited by the Act be responsibly connected with the business entity which is formally charged with the violations.
>
> The Act provides the framework by which the Secretary of Agriculture can regulate business practices in the perishable agricultural commodities industry. Essential to that regulation is the procedure outlined in section 4(d) whereby the Secretary may question the fitness of any particular applicant for a license to conduct business in the perishable agricultural commodities industry. In the

case of a corporate applicant, the inquiry into fitness extends not only to the corporate entity itself, but also to the principals of the corporation; specifically extending to an officer, director, or holder of more than 10 percent of the outstanding stock of the corporation. The inclusion of this level of inquiry into fitness, of course, recognizes that corporate activity is initiated by those persons who control the corporation.

Similarly, section 4(d) of the Act authorizes the Secretary to withhold the issuance of a license when a person who is responsibly connected with the applicant has engaged in practices of the nature prohibited by the Act. Hence if there is evidence that a person responsibly connected with the applicant has engaged in a prior course of conduct which included practices of the nature prohibited by the Act, then that person should be restrained in his methods of doing business in the perishable agricultural commodities industry in order to protect those members of the industry who can and do conduct their business in accordance with the dictates of the Act. Paul Gitmed as president and 50 percent shareholder of Golden West renders the applicant unfit to engage in the business of dealing in perishable agricultural commodities in interstate or foreign commerce as a commission merchant, dealer, or broker.

As stated more fully in the findings of fact, Paul Gitmed engaged in practices of a nature prohibited by the Act. From January 1973 through September 1974, C&M, a licensee under the Act, violated section 2(4) of the Act by failing to account truly and correctly and make full payment promptly of the net proceeds derived from the sale of deciduous fruits handled on consignment. During the time in which at least 117 of those violations occurred, Paul Gitmed operated the deciduous fruit department of C&M. . . .

* * * * * * *

Respondent's argument that Paul Gitmed could not have violated the Act while working for C&M, since C&M committed the violations, is irrelevant since Golden West's application for a license may be refused if it is "unfit" because "any officer or holder of more than 10 per centum of

> the stock * * * engaged in any practice of the character prohibited by this chapter" (7 U.S.C. 499d(d)). It is not necessary to find that Paul Gitmed, who is president of Golden West and holds 50% of its stock, violated the Act previously—only that he engaged in a practice *of the character* prohibited by the Act. That he clearly did.

Here, as in *Golden West*, Mr. Scharf did not previously violate the Act. Fresh World did. However, as General Manager of Fresh World, he engaged in practices that were a primary cause of Fresh World's violations. Hence respondent is unfit to engage in business as a licensee because of Mr. Scharf's association with respondent.

Respondent contends that the ALJ applied an erroneous standard of proof (pp. 42-43, *supra*). However, once complainant established that Mr. Scharf engaged in a practice of the character prohibited by the Act, the burden of proof was on respondent to show that it is, nonetheless, fit to receive a license. The Act states that if "after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to *show cause why the license should not be refused*" (7 U.S.C. 499d(d), emphasis added). The Act does not state that the hearing is to show cause why the license should not be *issued*. Under the wording of the Act, respondent is the proponent of an order that the "license should not be refused." Accordingly, respondent has the burden of proving "why the license should not be refused." See 5 U.S.C. § 556(d). As stated in *In re Golden West Wholesale Fruit Distributors, Inc.*, 36 Agric. Dec. 1591, 1598 (1977):

4. Donald Scharf was president and/or general manager, and/or a director of Fresh World, Inc., . . . during the period June 1982 through September 1983. . . .

* * * * * * *

6. During the period June 1983 through September 1983, Fresh World, Inc., violated Section 2(4) of the PACA (7 U.S.C. 499b(4)), by failing to make full payment promptly to 20 sellers of the agreed purchase prices or balances thereof, in the total amount of $331,194.55 for 85 lots of perishable agricultural commodities purchased, moved and accepted in interstate or foreign commerce. The details of these transactions are set forth below:

* * * * * * *

The total amount past due and unpaid these 20 sellers is $331,194.55.

7. On information and belief, during the period June 1983 through September 1983, Donald Scharf, acting as general manager, made all decisions regarding from whom Fresh World, Inc., would purchase and to whom it would sell perishable agricultural commodities. Until August 9, 1983, Donald Scharf had authority to issue checks for Fresh World, Inc. During the above period, Donald Scharf sold to Central Produce Corp., San Juan, Puerto Rico substantial quantities of produce purchased by Fresh World, Inc., permitting an indebtedness from Central Produce Corp., to Fresh World, Inc., of more than $300,000 to accrue. Central Produce has failed and refused to pay this indebtedness.

* * * * * * *

10. Donald Scharf, as president, director and/or general manager of Fresh World, Inc., during the period in which the violations of the PACA alleged in paragraphs 6 and 8 above occurred, is responsible for the commission of these violations. These acts constitute practices of the character prohibited by the PACA.

The Notice to Show Cause sets forth precisely complainant's contentions involved here. But even if the allegations had not been precisely stated, it is well settled that the formalities and technicalities of court pleading are not applicable in administrative pro-

ceedings.[12] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.[13]

In addition, complainant's attorney made his position plain throughout the hearing, e.g., he stated (Tr. 370; and see Tr. 610–11):

> The issue is whether Mr. Scharf engaged in practices of the contract [character] prohibited by the act. The practices with which we are concerned are the purchases of commodities for [from] produce sellers which were not paid for by Fresh World.
>
> And we respectfully suggest that we are laying responsibility on Mr. Scharf for those kinds of actions. . . .

Furthermore, complainant rested on February 10, 1984, and most of respondent's case was not put on until April 4 and 5, 1984. In a hearing conducted at intervals, there is little or no basis for a complaint as to the adequacy of the administrative allegations instituting the procedure.[14]

For the foregoing reasons, the following order should be issued.[15]

[12] *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142–44 (1940).

[13] *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350–51 (1938); *Aloha Airlines, Inc.* v. *CAB*, 598 F.2d 250, 261–62 (D.C. Cir. 1979); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co.* v. *United States*, 393 F.2d 247, 252–53 (7th Cir. 1968); *Cella* v. *United States*, 208 F.2d 783, 788–89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Pub. Ass'n* v. *NLRB*, 193 F.2d 782, 799–800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union* v. *NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co.* v. *FTC*, 142 F.2d 511, 518–19 (6th Cir. 1944); *A.E. Staley Mfg. Co.* v. *FTC*, 135 F.2d 453, 454–55 (7th Cir. 1943); *NLRB* v. *Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug 11, 1980); *In re Holcomb*, 35 Agric. Dec. 1165, 1173–74 (1976).

[14] *Locomotive Finished Material Co.* v. *NLRB*, 142 F.2d 802, 804–05 (10th Cir. 1944); *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

[15] It would be helpful in future cases if the ALJ would require the parties to number the pages of multi-page exhibits.

ORDER

The respondent's, H & J Brokerage, Inc.'s, application for a license under the Perishable Agricultural Commodities Act is denied.

Copies hereof shall be served upon the parties.

APPENDIX

In re B.G. Sales Co., 44 Agric. Dec. ____ (Oct. 9, 1985).

[Excerpt omitted.—Ed.]

In re: EMERSON ELLIOTT PRODUCE, PACA Docket No. 2-6970. Decided April 21, 1986.

Failure to make prompt payment—License revoked.

Edward M. Silverstein, for complainant.
Raymond Rotella, Orlando, FL, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 3, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May through October 1984, respondent purchased, received and accepted, in interstate and foreign commerce, from 16 sellers, 41 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $221,886.84.

A copy of the complaint was served upon respondent which filed an answer thereto admitting all of the material allegations of the complaint with one minor exception.[1] In view of this, and upon complainant's motion, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

[1] Respondent denies being indebted to Growers Packing Company, Florida City, Florida, in the amount of $22,773.80 for four lots of tomatoes. In its motion for a decision, complainant has withdrawn this allegation.

FINDINGS OF FACT

1. Respondent, Emerson H. Elliott, is an individual doing business as Emerson Elliott Produce, whose mailing address is P.O. Box 745, Casselberry, Florida 32707.

2. Pursuant to the licensing provisions of the Act, license number 801217 was issued to respondent on June 24, 1980. This license was renewed annually, and was next subject to renewal on or before June 24, 1986. However, respondent's license was automatically suspended on February 27, 1985, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d) when he failed to satisfy a reparation award issued against him in PACA Docket No. 2-6699 (44 Agric. Dec. ____).

3. As more fully set forth in paragraph 5 of the complaint, during the period June through October 1984 respondent purchased, received and accepted in interstate and foreign commerce, from 15 sellers, 37 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $199,113.04.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 37 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b). *Zwick* v. *Freeman*, 373 F.2d 110 (2d Cir.), *cert. den.*, 389 U.S. 835 (1967); *George Steinberg and Son, Inc.* v. *Butz*, 491 F.2d 988 (2d Cir.), *cert. den.*, 419 U.S. 830 (1974); *Marvin Tragash Co.* v. *United States Dept. of Agr.*, 524 F.2d 1255 (5th Cir. 1975); *United Fruit & Veg. Co.* v. *Dir. of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir.), *cert. den.*, 456 U.S. 1007 (1982); *Wayne Cusimano, Inc.* v. *Block*, 692 F.2d 1025 (5th Cir. 1982); *Finer Foods Sales Co., Inc.* v. *Block*, 708 F.2d 774 (D.C. Cir. 1983); and *Melvin Beene Produce* v. *Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). Accordingly the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after

service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[Decision and Order became final on May 29, 1986.—Ed.]

In re: GULFPORT TOMATOES, INC., PACA Docket No. 2-7085. Decided June 12, 1986.

Failure to pay—repeated—publish.

Ben E. Bruner, for complainant.
William D. Bethea, Gulfport, MS, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.;* hereinafter referred to as the "Act"), instituted by a complaint filed on February 6, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period April 1984 through April 1985, Respondent failed to make full payment promptly to nine sellers, of the agreed purchase prices, or balances thereof, in the total amount of $165,635.43 for 52 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce. A copy of the Complaint was served upon Respondent. Respondent filed an Answer admitting the material allegations of the Complaint. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Gulfport Tomatoes, Inc., (hereinafter "Respondent"), is a Mississippi corporation, whose mailing address is P.O. Box 999, Gulfport, Mississippi 39501.

2. Pursuant to the licensing provisions of the Act, license number 681081 was issued to Respondent on December 20, 1967. This license has been renewed annually, but terminated on December 20,

1985, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth more fully in paragraph 5 of the Complaint, during the period April 1984 through April 1985, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or balances thereof, in the total amount of $165,635.43 for 52 lots of perishable agricultural commodities, purchased, received, and accepted in interstate commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

ORDER

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above be published.

This order shall become effective on June 23, 1986.

Copies hereof shall be served upon the parties.

In re: GREEN VILLAGE FRUIT AND VEGETABLE, INC., PACA Docket No. 2-6845. Decided May 8, 1986.

Failure to pay promptly—application for license denied.

Jory Hochberg, for complainant.
Denise Langer, New York, NY, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding to discipline respondent and deny it a license was instituted by a Notice to Show Cause and Complaint filed on June 5, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture under the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; the "PACA"), applicable regulations (7 CFR 46.1 through 46.45), and Rules of Prac-

tice (7 CFR 1.130 through 1.151). The Notice to Show Cause and Complaint alleges that respondent, Green Village Fruit & Vegetable, Inc., violated section 2 of the PACA (7 U.S.C. 499b) by failing to make full payment promptly of the agreed purchase prices for 69 lots of mixed fruits and vegetables, all being perishable agricultural commodities, for a total of $259,618.92. Respondent filed an answer on July 22, 1985, in which it denied violating the PACA.

Oral hearing was held before me on December 5, 1985, in New York, New York. Complainant was represented by Jory M. Hochberg, Esq., Office of the General Counsel, U. S. Department of Agriculture, Washington, D. C. 20250. Respondent was represented by G. Oliver Koppell, 28 West 44th Street, New York, New York 10036. The complaint was amended at the hearing to include additional instances of respondent's alleged failures to make full payment promptly to H. Schnell & Co., one of the sellers originally named in the complaint.

Briefing was completed on April 25, 1986.

Upon consideration of the evidence of record, the arguments of counsel, and the proposed findings, conclusions and briefs filed by the parties, a finding is being entered that respondent committed repeated and flagrant violations of the PACA, and its application for a license under the PACA is being denied.

PERTINENT STATUTORY PROVISIONS

1. Sec. 2(4).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * * * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with

any such transaction; or to fail to maintain the trust as required under Section 5(c);

2. Sec. 4(a).

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided,* That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further,* That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 3(b), plus $5, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 3(b): *And provided further,* That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination;

3. Sec. 4(d)

(d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per cent of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . If after the investigation the Secretary believes that the applicant shall be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary

finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . or in case the applicant is a corporation, any officer or holder of more than 10 per cent of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this Act . . . the Secretary may refuse to issue a license to the applicant.

4. Sec. 8(a)

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

PERTINENT REGULATIONS

Sec. 46.2(aa)

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

* * * * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

* * * * * * *

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then pay-

ment within the agreed upon time shall constitute 'full payment promptly', *Provided,* That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

FINDINGS OF FACT

1. Respondent is a New York corporation whose address is New York City Terminal Market, No. 220A, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the PACA, on January 26, 1984, license number 840616 was issued to Sechin K. Kim, also known as Se Chin K. Kim, to do business in his own name. Since on its first anniversary date, Mr. Kim indicated on his renewal application that his business had incorporated, Mr. Kim was advised that it was necessary to apply for a corporate license. The individual license of Mr. Kim terminated on January 26, 1985, and thereafter, Green Village, of which Mr. Kim is the sole officer, director and stockholder continued to operate subject to the PACA without a valid license. On May 8, 1985, respondent, Green Village Fruit & Vegetable, Inc., applied for a PACA license.

3. During the period November 1984 through January 1985, Sechin K. Kim purchased, received, and accepted, in interstate and foreign commerce, 69 lots of mixed fruits and vegetables, all being perishable agricultural commodities, from three sellers set forth in the complaint for a total obligation of $255,169.82. He failed to promptly pay such obligations. During the period February 1985 through April 1985, Sechin K. Kim, now incorporated as respondent, purchased additional lots of mixed fruits and vegetables from one of these sellers and failed to promptly pay in full the agreed purchase prices and this seller, at the time of the hearing, was still owed approximately $90,000, although the other two sellers had been paid in full.

CONCLUSIONS

Respondent's failures to fully and promptly pay the agreed purchase prices for numerous lots of perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant and/or repeated violations of section 2 of the PACA (7 U.S.C. 499b). Respondent should be refused the PACA license for which it has made application because respondent and its sole officer, director and stockholder, Sechin K. Kim, engaged in conduct of a character prohibited by the PACA which makes it unfit to engage in the business of a commission merchant, dealer or broker.

DISCUSSION

A. Introduction

This is a combined Notice to Show Cause and disciplinary proceeding brought pursuant to sections 4 and 8 of the PACA (7 U.S.C. 499d, 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. (H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey* v. *Guerin,* 443 F.2d 584 (6th Cir. 1971); *O'Day* v. *George Arakelian Farms, Inc.,* 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." *Id.* at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930) 3. *See, also, George Steinberg and Son, Inc.* v. *Butz,* 491 F.2d 988 (2d Cir.), *cert. den.,* 419 U.S. 830 (1974). Complementary to this enforcement scheme, the Secretary has the authority to refuse to issue a license to an applicant which has committed the kind of acts which are prohibited under the PACA.

The purpose of the present proceeding is to determine whether respondent violated section 2(4) of the PACA (7 U.S.C. 499b(4)) and, if so, the appropriate sanction, if any, to be imposed, as well as whether respondent is unfit to be granted the new PACA license for which it has made application.

B. Respondent Violated the PACA

Section 2(4) of the PACA (7 U.S.C. 499b(4)) makes it unlawful, *inter alia,* for any commission merchant, dealer, or broker as defined by the act (7 U.S.C. 499a(5)(6) and (7)), to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. "Full payment promptly," under Departmental regulation (7 CFR § 46.2(aa)(5)) requires that the agreed purchase prices for produce be paid in full within 10 days after the day on which the produce is accepted. Respondent stipulated at the hearing that full payment was not made promptly, as required by the regulations, for all of the perishable agricultural commodities accepted from Kleiman-Hochberg and D'Arrigo Brothers, as tabulated on

page 4 of the complaint, and that these amounts remained overdue for six months or more. Although complainant has stipulated that the indebtedness to D'Arrigo and Kleiman-Hochberg which was alleged in the complaint has now been fully paid, this does not alter the fact of the violations. *See, Baltimore Tomato Company, Inc.*, 39 Agric. Dec. 412 (1980); and *V.P.C., Inc., t/a Peter T. Glakas Produce*, PACA Docket No. 2-5844 (April 14, 1982).

Although respondent did not enter into any stipulations respecting its indebtedness to the remaining seller, H. Schnell & Co., it offered no evidence to contest the allegations that it failed to pay promptly for the perishable agricultural commodities shown on the invoices contained in Complainant's Exhibit Nos. 44 through 71, which cover the time period covered by the complaint. Instead, respondent contends that the indebtedness resulting from these particular transactions has now been paid, and that respondent's indebtedness at the time of the hearing to H. Schnell arose from subsequent transactions (for which the complaint was amended) and should not be considered. However, the testimony of Mr. Golding, H. Schnell's Office Manager, Complainant's Exhibit No. 72, and respondent's admissions at the hearing, provide ample support for the conclusion that respondent had failed to make timely payment and still owed for approximately $90,000 of perishable fruits and vegetables which it purchased and accepted from Schnell in interstate commerce.

quirements yet it continued to buy knowing that each purchase would result in another violation. A licensee is required under the PACA to have sufficient capital with which to operate. Respondent did not and, consequently, could not pay its suppliers. Under these circumstances, it must be concluded that respondent was operating in careless disregard of the payment requirements of the PACA, and that its consequent violations were willful. *Atlantic Produce, supra,* 35 Agric. Dec. 1631, 1961; *Rudolph John Kafcsak,* 39 Agric. Dec. 683 (1980), *aff'd. mem.,* 673 F.2d 1329 (6th Cir. 1981).

C. Disciplinary Sanction and Denial of New PACA License

If a licensee who has failed to pay for produce is not current in his payments at the time the oral hearing is convened, the appropriate disciplinary sanction is revocation of an existing PACA license. *See Gilardi Truck & Transportation, Inc.,* decided January 27, 1984, and *Finer Foods Sales Co., Inc.* v. *John R. Block,* 708 F.2d 774 (D.C. Cir. 1983). This was explained to respondent's counsel in advance of the hearing which was delayed to give respondent time to become current. But respondent still owed $90,000 to a produce seller at the time of the hearing. From that point on, my discretion in this case, under controlling Departmental policy, became most limited. This, too, was explained to respondent's counsel who was advised that unless he could arrange for a voluntary settlement with complainant before I entered my decision, I would have to treat this as a "no pay" rather than a "slow pay" case which, under *Gilardi* and other Departmental decisions, requires the revocation of an existing license. As a disciplinary sanction for respondent's violations of section 2(4) of the PACA, complainant seeks, instead of revocation, a finding that respondent, an unlicensed entity, committed repeated and flagrant violations of the Act and that the finding be published. This sanction has the same effect on a violator and persons responsibly connected with a violator as does license revocation. *Jarosz Produce Farms,* 42 Agric. Dec. ____ (Oct. 5, 1983).This sanction is appropriate under controlling Departmental policy in light of the number of violations, the seriousness of the violations, the impact of violations on the industry as a whole, and the financial status of respondent. Taking all these factors into consideration, the sanction sought by complainant shall be granted. *See, J. H. Norman & Sons Distributing Co.,* 37 Agric. Dec.705 (1978); *G. Steinberg & Son, supra,* 32 Agric. Dec. 236.

In addition to being a disciplinary proceeding, this is a proceeding to show cause why respondent's pending license application should not be denied. The burden of proof in such a proceeding initially falls upon the complainant who must demonstrate good

reason why the license application is being challenged. However, once the complainant has provided such good reason, the burden of proof shifts to the applicant to show cause why its application should be granted. *Pappas Produce,* 36 Agric. Dec. 684 (1977).

In the present case, complainant has established that respondent's sole officer, director and stockholder violated section 2(4) of the PACA by failing to make prompt payment to three sellers in excess of $250,000 worth of mixed fruits and vegetables. The evidence further established that as of the date of the hearing, respondent owed long overdue debts in a total amount of approximately $90,000 to one of these sellers, H. Schnell & Co. This evidence provides substantial and sufficient reason for the denial of respondent's license application. Respondent's evidence does not sustain the contrary conclusion.

Respondent's sole witness and President, Mr. Kim, made absolutely no attempt to refute or deny his failure and that of respondent to pay for the transactions alleged in the complaint, or the subsequent transactions with H. Schnell shown on Complainant's Exhibit No. 72. Instead, he explained the failures to pay these debts as they became due on the basis of unpaid loans totalling $500,000 he made to friends some two years ago. By so doing, Mr. Kim left his business undercapitalized which is a circumstance that is never condoned under the Act. The Department of Agriculture treats its issuance of a PACA license to an applicant as an attestation to the industry that the applicant is believed able and determined to comply with the Act's financial requirements. *V.P.C. Inc.,* 41 Agric. Dec. 734 (1982). Respondent's financial history prevents the Secretary from so attesting. Under these circumstances, the respondent's license application shall be denied.

ORDER

Respondent, Green Village Fruit & Vegetable, Inc., has committed repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)).

The application for a license made pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) by respondent is denied.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[Decision and Order became final on June 16, 1986.]

In re: BATTAGLIA DISTRIBUTING COMPANY, INC., PACA Docket No. 2-7167. Decided June 18, 1986.

Violated suspension as dealer—application granted but suspended for 90 days—Consent.

Edward M. Silverstein, for complainant.
Leroy W. Gudgeon, Northfield, IL, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

PRELIMINARY STATEMENT

This is a Notice to Show Cause proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter the "PACA"). The Notice to Show Cause was filed on May 1, 1986, alleging that the respondent was unfit for the issuance of a license under the PACA. A hearing was scheduled on May 22, 1986. During negotiations which took place at the hearing, the parties agreed to an amicable settlement of this matter. Therefore, pursuant to this agreement, the following decision and order is issued without further proceeding.

FINDINGS OF FACT

1. Respondent, Battaglia Distributing Company, Inc., is a corporation whose business address is 2545 South Ashland Avenue, Chicago, Illinois 60608.

2. The persons who are responsibly connected with respondent are as follows: Frank P. Battaglia, president, director, and 33.3 percent stockholder; Anthony J. Battaglia, treasurer, director, and 33.3 percent stockholder; Joseph L. Battaglia, secretary, director, and 33.3 percent stockholder; and Ernest A. Battaglia, vice-president.

3. August Battaglia Processing Company, an Illinois Corporation, whose address is also 2545 South Ashland Avenue, Chicago, Illinois 60608, was issued license no. 841376 pursuant to the licensing provisions of the PACA. This license is still in effect, and is next subject to renewal on June 6, 1986. The persons who are responsibly connected with this company are as follows: Frank P. Battaglia, vice-president, treasurer, director, and 33.3 percent stockholder;

Anthony J. Battaglia, president, director, and 33.3 percent stockholder; Joseph L. Battaglia, secretary and 33.3 percent stockholder; and Ernest Battaglia, vice-president. Also, August J. Battaglia and George Battaglia are vice-presidents.

4. August Battaglia Company, Inc., is an Illinois corporation whose address is 15 South Water Market, Chicago, Illinois 60608, which was issued PACA license no. 106488 on March 27, 1947. This license terminated on March 27, 1986, pursuant to section 4(a) of the PACA (7 U.S.C. 499d(a)) when the firm failed to pay the required annual renewal fee. The persons who were responsibly connected with this company were as follows: Frank P. Battaglia, vice president, treasurer, and director; Anthony J. Battaglia, president and director; Joseph L. Battaglia, secretary and director; and Ernest Battaglia, vice-president. Also, August J. Battaglia and George C. Battaglia were vice-presidents, and A. Battaglia Holding Company was its 100 percent stockholder.

5. An audit of the business records of August Battaglia Company, Inc., was conducted from January through March 1985, in connection with a reparation complaint filed against it pursuant to section 6 of the PACA (7 U.S.C. 499f) by a shipper. This audit established that, from September 1983 through November 1984, August Battaglia Company, Inc., failed to account truly and correctly, and also failed to make full payment promptly, to five shippers of the net proceeds realized from the sale of fruit, all being perishable agricultural commodities, received and accepted on consignment, in interstate commerce. The amount which August Battaglia Company, Inc., was found to have underreported and underpaid to its principals totalled $50,901.54. August Battaglia Company, Inc., agreed to, and did, make full restitution to these shippers. Thereafter, pursuant to section 6(c) of the PACA (7 U.S.C. 499f(c)), a disciplinary complaint was filed and served upon August Battaglia Company, Inc. The corporation answered the complaint, admitted the violations of the PACA, and consented to the suspension of its PACA license for 45 days. On January 22, 1986, a Decision and Order was issued suspending the PACA license of August Battaglia Company, Inc., for the 45 day period January 22, 1986, through March 7, 1986. *See* PACA Docket No. 2–7048. By letter dated January 27, 1986, the responsibly connected persons affiliated with August Battaglia Company, Inc., named in paragraph 4 above, were advised as to the issuance of the Decision and Order, and also were advised that they were under employment and licensing restrictions during the license suspension period.

6. During the January 22, 1986, through March 7, 1986, suspension of the PACA license of the August Battaglia Company, Inc.,

August Battaglia Processing Company did not operate as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. 449a).

7. On May 22, 1985, an application for a license pursuant to the provisions of the PACA was received from respondent. Respondent stated on its application that it had conducted business subject to the PACA since May 21, 1985. This application was returned to respondent for correction and amendment by a certified letter dated June 11, 1985, which was received by respondent on June 14, 1985. The firm resubmitted a completed application on July 23, 1985, but by letter dated August 12, 1985, requested that the application be withdrawn. Accordingly, under cover of certified letter dated August 22, 1985, and received by respondent on August 26, 1985, the application was returned. At that time respondent was warned that it could not operate subject to the PACA without holding a valid and effective license.

8. Despite being warned that it could not operate without holding a valid and effective license, respondent continued to operate as a dealer, as that term is defined in section 1 of the PACA (7 U.S.C. 499a). Such operation continued until on or about February 26, 1986.

9. Even before receiving the August 22, 1985, warning letter, respondent had operated as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. 499a), but without holding a valid and effective PACA license in that, since at least August 22, 1983, it purchased numerous lots of perishable agricultural commodities in interstate and foreign commerce in sufficient quantities to require being licensed.

10. The acts of August Battaglia Company, Inc. in failing to truly and correctly account and make full payment promptly for consignment transactions as found in paragraph 5 above, constitute willful, repeated and flagrant violations of the PACA and also constitute practices of a character prohibited by the PACA.

11. The acts of respondent in operating as a dealer as that term is defined in section 1 of the PACA (7 U.S.C. § 499a), without holding a valid and effective license in violation of section 3 of the PACA (7 U.S.C. § 499c), from August 22, 1983, through February 26, 1986, and in particular during the 45-day period, January 22, 1986, through March 7, 1986, when the license of August Battaglia Company, Inc., was suspended, as found in paragraphs 9 and 10 above, constitute willful, repeated and flagrant violations of the PACA and also constitutes a practice of a character prohibited by the PACA.

CONCLUSION

The acts of August Battaglia Company Inc. referred to in paragraph 10 of the Findings of Facts as well as the acts of respondent referred to in paragraph 11 of the Findings of Facts, in particular respondent's in operation as a dealer as that term is defined in section 1 of the PACA without holding a valid and effective license during the period January 22, 1986, through March 7, 1986, when it was barred from so operating as a consequence of the suspension of its sister corporation August Battaglia Company, Inc., constitutes a willful, repeated and flagrant violation of the PACA, and also constitutes a practice of a character prohibited by the PACA. In view of this, the following order is issued.

ORDER

The respondent's application for a PACA license shall be granted on the effective date of this order.

Respondent's license is suspended for 90 days from the effective date of this order.

The effective date of this order is June 30, 1986.

Chief Administrative Law Judge John A. Campbell retains jurisdiction of this matter until 120 days after the effective date thereof. During this 120 day period, the complainant may file a motion seeking revocation of respondent's license on the basis that respondent, any of its responsibly connected individuals, or any entity with which its responsibly connected individuals, are employed as that term is defined in section 1(10) of the "PACA" (7 U.S.C. § 499a(10), has violated the terms of the 90 day suspension order.

If the respondent and/or any of its responsibly connected persons and/or any entity which employs its responsibly connected persons violate the terms of the 90 day suspension ordered above, the respondent consents to the revocation of its PACA license.

Copies of this order shall be served upon the parties.

REPARATION DECISIONS

MIC BRUCE, INC., a/t/a SINGER'S, *v.* CHIQUITA BRANDS, INC., PACA Docket No. 2-6608. Decided May 1, 1986.

Uniform Commercial Code—Custom of the industry—course of conduct—good delivery standards for bananas—proof of damages—reparation awarded.

Although there are no published standards to determine whether bananas make good delivery, the Secretary has jurisdiction to make such a finding, and will do so by applying a reasonable test. Where respondent claims it is not liable for damages because the custom of the industry is to settle on basis of f.o.b. price plus costs, it must prove such custom by showing specific instances. Since respondent failed to do so, and failed to prove acquiescence in such method by complainant, it is liable for damages in those cases in which complainant proved the bananas did not make good delivery.

Dennis Becker, Presiding Officer.
Stephen P. McCarron, Esquire, Silver Spring, MD, for complainant.
John G. Ingram, Esquire, New York, NY and *Richard J. Reisert, Esquire,* New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $66,697.25, plus interest, in connection with fourteen transactions involving the purchase and sale of bananas during the months of March through May, 1983, in interstate and foreign commerce.

A copy of the Department's report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting that it owed complainant $9,286.00, and denying any liability to complainant with respect to the remaining $57,411.25. An order requiring respondent to pay complainant the undisputed amount was issued on September 18, 1984, leaving the question of liability for the remainder to be resolved in an oral hearing. Depositions were taken in which both parties were represented, and an oral hearing was held in Montvale, New Jersey, on June 11, and 12, 1985. Both parties were represented by counsel. Thereafter, both parties filed briefs.

FINDINGS OF FACT

1. Complainant, Mic Bruce, Inc., also trading as Singer's, hereinafter referred to as respondent or Singer's, is a corporation with an address at Unit 26, 4000 Orange Avenue, Northern Ohio Food Ter-

minal, Cleveland, Ohio 44115. At the time of the transactions at issue in this proceeding complainant was licensed under the Act.

2. Respondent, Chiquita Brands Inc., hereinafter referred to as respondent or Chiquita, is a corporation with an address at 15 Mercedes Drive, Montvale, New Jersey, 07645. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. Complainant and respondent had engaged in business with each other for at least two years prior to the date of the transactions involved in this proceeding. In those prior transactions complainant purchased bananas from respondent on frequent occasions. On three occasions prior to the transactions at issue in this proceeding complainant notified respondent that the bananas which it purchased were not in accord with contract specifications. Respondent afforded complainant adjustments for each of those transactions based upon what has been its longstanding practice in making adjustments when bananas arrived at their destination in other than a condition which is in accordance with contract specifications. Complainant accepted the amounts of money offered by respondent with respect to each of those transactions. However, with respect to two transactions which occurred in November 1982, complainant accepted the allowances under protest. Complainant stated in a letter dated December 29, 1982, that it did not have time to contest what it believed to be unfair settlements with respect to the two transactions, but that it would not permit such alleged unfairness to occur in the future. It also stated that one way or the other respondent would end up having to pay for its supposedly arbitrary method of settling contract disputes.

4. There are no published federal standards with respect to the quality or condition which bananas must manifest at shipping point or destination in order to make good delivery. Respondent, however, has developed and applied for many years its own method of granting adjustments to purchasers of its bananas based on the free on board price paid by the purchaser plus the purchaser's expenses, such as trucking, sorting and other handling, as computed by respondent. Respondent has not granted any adjustments based upon lost profits because the bananas did not meet contract specifications. Respondent applied its usual method with respect to the three transactions which occurred prior to 1983 in which complainant filed claims for adjustments. Respondent also utilized its own method of computing adjustments with respect to the fourteen transactions at issue in this proceeding, but did not specify in its accountings to complainant how it arrived at its final computation as to what the adjustments should be.

5. Commercial bananas are not grown in the United States. Rather, they are grown in Latin America, and shipped from the various countries to ports in the United States aboard vessels, where they are unloaded for further transportation to ultimate destination. Transportation from Latin America to port in the United States normally takes less than one week.

6. When bananas are loaded and shipped their skin has a dark green color. Respondent performs an inspection at shipping point in Latin America. The bananas are shipped under controlled temperature conditions in the vessels, so as to assure that they arrive in good commercial condition. At the port of destination the bananas are inspected again as they are unloaded to ascertain that their condition has not deteriorated during transit. This is called a discharge inspection. In addition, a sample of bananas is taken from the full shipment, and set aside by respondent for further inspection at a later time so as to determine whether after shipment from port to ultimate destination the bananas should have continued to be in good commercial condition. This is called an after-ripe inspection.

7. After the inspection on unloading the bananas from the vessel, bananas are reloaded aboard trucks or other transport for transportation to their ultimate destination. They are generally sold by respondent to the buyer free on board the port of discharge. Instructions are given to the transporters of the bananas as to the temperatures that are to be maintained during inland transit.

8. At destination, the bananas are unloaded by the receiver, and taken into its place of business for further ripening and eventual sale. Ripening occurs in special rooms for that purpose, and can be controlled so as to take as much as ten or twelve days to reach the desired amount of ripeness. Chiquita's practice has been that in the event the receiver or buyer determines that the bananas do not meet quality and condition standards under the applicable contract, the buyer must pay the full contract price, and wait for any potential refund from respondent. In order to prove that the bananas were not in accordance with contract specifications a receiver or buyer is required to notify respondent within 48 hours of their arrival that it believes the bananas have quality or condition defects. The receiver or buyer must also file a formal written complaint in which it specifies the amount of damages it claims within 60 days after it has received the bananas. Respondent provides its own inspector to ascertain the quality or condition of the bananas as soon after it receives notification as is possible. It is generally accepted that the inspections provided by respondent are excellent in terms of quality, and complainant acknowledged such is the

case. It is the usual practice of Chiquita to inspect only for the defects complained about in the claim filed by the receiver or buyer within 48 hours of their receipt, although at times it may also look for defects complained about in the written complaint.

9. On March 23, 1983, the vessel Rio Babahoya docked at Albany, New York. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from that ship on that date, and loaded three trucks for delivery to complainant in Cleveland, Ohio. The sale price was $10.00 per carton for each load, f.o.b., plus $1,038.00 as a fuel surcharge, $934.20 for handling, and $45.00 for temperature recorders, for a total contract price for the three transactions of $27,967.20. Complainant made timely payment of this amount to respondent. Complainant also paid $1,742.31 for freight, bringing its total costs to point of destination to $29,709.51. One shipment with 875 cartons arrived on March 24, 1983, and the other two shipments arrived at respondent's place of business on March 25, 1985. They involved 870 and 850 cartons. The inspection at the port of discharge showed that the pulps of those bananas which were inspected ranged between 56 degrees and 58 degrees fahrenheit. The temperature recorders with respect to the load which arrived on March 24, 1983, and one of the loads which arrived on March 25, 1983, showed that the temperature of the carrying portion of the truck was 58 to 60 degrees fahrenheit and 64 to 66 degrees fahrenheit, respectively. The pulp temperatures of those two loads were recorded on arrival in Cleveland as 57 to 58 degrees fahrenheit and 62 to 63 degrees fahrenheit, respectively. The pulp temperature of the third truck on arrival was shown to be 54 to 58 degrees fahrenheit. Complainant received, accepted and unloaded the three truckloads of bananas. It also notified respondent within 48 hours of acceptance that it believed the bananas had difficulties, and stated orally that it believed that they were ripe and turning. Subsequently, complainant filed a written complaint in which it stated that "fruit was showing a chill effect w/out any other characteristics of chill except the grey cast to the peel. All temperatures w/in tolerance." In the remarks section of that same form respondent wrote "complaint on discoloration (and after ripening) on arrival. Customer requested our QC inspection." The bananas were inspected on March 28, 1983. The inspection showed with respect to the load which arrived on March 24, 1983 that eight percent of the bananas were ripe and turning or ripe. With respect to the truckload containing 850 cartons which arrived on March 25, 1983 it showed 14 percent of the cartons were ripe and turning or ripe. Complainant claimed to have lost $1,458.10 with respect to the load which arrived on March 24, 1983,

and $2,598.50 and $1,710.25 with respect to the two loads which arrived on March 25, 1983. Its total claim with respect to the three loads was $5,766.85. Complainant conveyed these claims to respondent. Sometime thereafter respondent made a settlement offer of $4,000.00. Respondent did not explain to complainant how it arrived at the $4,000.00 settlement figure. Having previously paid the contract price for the three loads of bananas in full complainant accepted the $4,000.00 as a partial settlement.

10. On March 31, 1983, the vessel Rio Sulaco docked at Charleston, South Carolina. It contained bananas shipped in foreign commerce by respondent. The bananas were unloaded from the Rio Sulaco on March 31, 1983, and placed aboard trucks for shipment to various receivers. Four loads were destined for complainant. The sale price was $9.00 per carton for each load, f.o.b., plus $1,358.40 as a fuel surcharge, handling charges of $1,154.00 and $90.00 for temperature recorders, for a total contract price for the four transactions of $33,167.04. Complainant made timely payment of this amount to respondent. Complainant also paid $3,483.99 for freight and $678.40 for handling, bringing its total costs to point of destination to $37,329.43. Two shipments arrived on April 2, 1983, one with 848 cartons and the other with 850. One shipment of 848 cartons arrived on April 4, 1983, and the fourth shipment with 850 cartons arrived on April 5, 1983. The bananas were inspected at the port of discharge and showed scorable defects between 3.4 percent and 4.1 percent with ripe and turning bananas between 0.8 percent and 1.5 percent. They showed pulp temperatures of 58 to 60 degrees fahrenheit. The pulp temperature on arrival on April 2, 1983 of one truck was 58 to 60 degrees fahrenheit. The pulp temperatures on arrival of the truck which arrived April 4, 1983 was 60 to 65 degrees fahrenheit. The temperature recorders with respect to the two loads which arrived April 2, 1983 showed carrying temperatures on the trucks of 55 to 56 degrees fahrenheit and 57 to 58 degrees fahrenheit, respectively. There were no temperature recordings shown with respect to the loads which arrived on April 4, 1983 and April 5, 1983. With respect to all four loads complainant made a request for inspection by respondent within 48 hours after the bananas arrived. With respect to the two loads which arrived on April 2, 1983, complainant based its initial claim for reimbursement on the fact that the bananas showed a grey color. With respect to the load that arrived on April 4, 1983, complainant filed its initial claim on the basis that the bananas were ripe and turning, and subsequently made its written claim on the basis that the bananas showed chill. All loads were inspected by respondent. The record shows specifically only with respect to the load of bananas

which arrived on April 4, 1983, that it was inspected on April 13, 1983. However, all loads were inspected on or about that date. The inspection reports for all loads show that 30 percent of the bananas had underpeel discoloration. With respect to the two loads of bananas which arrived on April 2, 1983, complainant claimed it lost $918.50 and $2,328.75, respectively, for a total loss on the two loads of $3,247.25. Respondent declined to give any settlement with respect to these two loads, but did not state its reasoning in declining to do so. With respect to the loads which arrived on April 4, 1983, and April 5, 1983, complainant claimed it lost $2,597.64 and $2,148.02, respectively, for a total claim of $4,745.66. After inspection respondent offered $1,365.00 in settlement without explaining its reasons why. Having previously made full payment with respect to these two loads complainant accepted the $1,365.00 as a partial settlement.

11. On April 7, 1983, the vessel Chion Trader docked at Charleston, South Carolina. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from the ship on that date, and loaded three trucks for delivery to complainant in Cleveland, Ohio. The sale price was $9.50 per carton for each load, f.o.b., plus $1,030.00 as a fuel surcharge, $875.50 for handling, and $67.50 for temperature recorders, for a total contract price for the three transactions of $26,435.50. Complainant made timely payment of this amount to respondent. Complainant also paid $2,771.20 for freight, bringing its total costs to point of destination to $29,206.70. One truck carrying 875 cartons of bananas arrived on April 11, 1983, and the other two trucks, each carrying 850 cartons of bananas, arrived on April 12, 1983. The inspection at the port of discharge showed that the pulps of those bananas which were inspected ranged between 56 and 60 degrees fahrenheit. The temperature recorders with respect to the carrying portion of the trucks were 60 to 64 degrees for the load which arrived on April 11, 1983, and 58 to 66 degrees and 58 to 61 degrees, fahrenheit, respectively, for the loads which arrived on April 12, 1983. Inspections at the time of arrival show that the pulp temperatures of the bananas were 60 to 61 degrees, 59 to 61 degrees, and 59 to 60 degrees, respectively. Complainant received, accepted and unloaded the three truckloads of bananas. Complainant filed a complaint with respect to the condition of the three loads within 48 hours of their arrival, stating that they were mutilated, old, scarred, and of mixed grade. Subsequently, complainant filed a written complaint in which it stated that the reason for the complaint was that "upon ripening fruit was showing an off-color cast of grey as if to show chill without any other characteristics of chill and temperatures O.K. on ar-

rival." In the remarks portion of that same form respondent wrote "QC inspection after ripening brown discoloration." The bananas were inspected on April 13, 1983. The inspection showed with respect to two of the three loads that 35 percent (for the load arriving April 11, 1983) and 42 percent (for one load arriving April 12, 1983), of the clusters did not meet specifications. The inspection also appeared to show there was considerable underpeel discoloration. Complainant claimed that it lost $1,419.26, $1,611.00, and $1,924.25 with respect to the three loads for a total claim of $4,954.51. Complainant conveyed these claims to respondent. Respondent offered $2,000.00 in settlement with respect to one of the three loads which contained 850 cartons because it knew the bananas in that load had come from a hold in which there was considerable underpeel discoloration. Having previously paid the contract price for the bananas, complainant accepted the $2,000.00 offered as a partial settlement.

12. On May 4, 1983, the vessel Rio Babahoya docked at Albany, New York. It contained bananas shipped in foreign commerce by respondent. The vessel had been on the seas for a period of 12 days. Respondent unloaded the bananas on that date and loaded three trucks from Hold No. 4 for delivery to complainant in Cleveland, Ohio. The sale price was $11.50 per carton for each load, f.o.b., plus $1,020.00 as a fuel surcharge, and $918.00 for handling, for a total contract price for the three transactions of $31,263.00. Complainant made timely payment of this amount to respondent. Each truck contained 850 cartons. One truckload of bananas arrived at respondent's place of business on May 5, 1983, and two truckloads arrived on May 6, 1983. The inspection at port of discharge showed that the pulps of those bananas which were inspected ranged between 57 and 60 degrees fahrenheit. The bananas which came from Hold No. 4 showed that 3 percent were ripe and turning, and that there were a number of other condition defects. The pulp temperatures of the three loads on arrival in Cleveland were recorded as 57 to 60 degrees, 59 to 60 degrees, and 62 to 65 degrees fahrenheit, respectively. Complainant received, accepted and unloaded the three truckloads of bananas. Complainant notified respondent it was filing a claim on May 11, 1983. It filed a written complaint on or after that date in which it stated "These loads appeared to be old fruit. Upon arrival showed a slight discoloration, as if they were chilled, but temperatures were within tolerance. Upon ripening showed excessive discoloration and scarring with deep bruises—crown mold and occasional rot." The basis of its complaint was underpeel discoloration and the fact that the bananas were old. Respondent inspected the bananas on May 13, 1983. Its inspection re-

sulted in findings that "fruit appears fairly decent at end, but after processing too many show poor color but most not from chilling, and "100 boxes examined—sample divided between 3 rooms and 3 loads all gassed—avg color of all clusters 3—3½ OC—scattered throughout—34% med/sev—5%—off color from chilling 15%—Med/sev. 4%. Mostly large full mature fruit, 5% of boxes clusters showing ugly brownish outer peel discoloration and excessive amounts of CM/CR—NI/NR very mixed appearance, poor to fair." With respect to the three truckloads of bananas complainant claimed a total loss of $10,608.20. Respondent granted no adjustment with respect to the three truckloads.

13. On May 27, 1983, the vessel Olancho docked at the port of Albany, New York. It contained bananas shipped in foreign commerce by respondent. Respondent unloaded bananas from that ship on that date, and loaded one truck on that date for delivery to complainant in Cleveland, Ohio. The sale price was $10.00 per carton for 850 cartons, f.o.b., plus charges for a fuel surcharge, handling and a temperature recorder of $678.00, for a total contract price of $9,178.00. Complainant made timely payment of this amount to respondent. The shipment arrived at complainant's place of business on May 31, 1983. Complainant received, accepted and unloaded the bananas on that date. It immediately complained to respondent about the condition of the bananas. The inspection at port of discharge showed that the pulps of the bananas ranged from 58 to 60 degrees fahrenheit. It also showed that 90 percent of the clusters met specifications. The truckload arrived at complainant's place of business in Cleveland, Ohio on May 31, 1983, where it was received, accepted and unloaded. Upon arrival the temperature gauge for the carrying portion of the truck showed that the air temperature ranged during transit from 58 to 64 degrees fahrenheit. The pulps of the bananas on arrival were shown to be 61 to 62 degrees fahrenheit. Complainant filed an oral claim, and requested within 48 hours of their arrival that respondent inspect the bananas. The basis of its oral complaint was that the bananas showed mold, were old, ripe and turning, scarred and short. The basis of its written claim was the same. Complainant also said "This load was absolute *garbage*. The *WORST* load of bananas I ever received since entering the banana business." This complaint was filed on July 20, 1983. The bananas were inspected by respondent on June 1, 1983. The inspections showed that 45 percent of the bananas met specifications. Complainant claimed a loss with respect to the truckload of bananas of $6,369.10 based on costs of $9,178.00 less $3,424.50 fetched on resale as shown by its account of sale. Respondent of-

fered $1,921.00 in settlement. Complainant accepted the $1,921.00 as partial payment in settlement of the claim.

14. The total amount claimed by complainant with respect to the 14 loads of bananas described in paragraphs 8 through 12, above, was $35,691.57. The total amount granted by respondent in settlement was $9,286.00, leaving $26,405.57 of the initial claims by complainant unsatisfied.

15. Subsequent to the denials of the claims in the amount of $26,405.57, and more than 60 days after delivery, complainant on the advice of counsel, claimed allegedly lost profits as part of its damages, thereby raising its total claim to $66,697.25 less the $9,286.00 which had been granted by respondent, leaving a net amount it claimed as owed to it of $57,411.25, plus interest.

16. A major basis for the claims of damages with respect to the 14 transactions was that the bananas showed underpeel discoloration. Other claim bases were stated to be chill effect, grade, color, chill, off color, discoloration, and rot. With respect to the load which was unloaded from the Olancho there does not appear to have been a claim as regards chill effect or underpeel discoloration. Chill effect is generally manifested by a grey tone to the outer skin of the banana or speckling on the underpeel side of the banana. With very rare exceptions these two physical characteristics only occur if the bananas have been chilled below proper temperatures. The evidence of record with respect to the 13 transactions for which chill damage or underpeel discoloration was claimed shows that to the extent they were available at hearing the pulp temperatures of the bananas on arrival at the complainant's place of business in Cleveland, Ohio were at or above the pulp temperatures of the bananas when the bananas were discharged at port from the vessels which carried them in foreign commerce, with the exception of the load from the Rio Babahoya which arrived at the port of Albany on March 23, 1983 and at complainant's place of business with 850 boxes on the truck on March 25, 1983. There, the temperature of the pulp of the bananas on arrival was 54 to 58 degrees fahrenheit, whereas the temperature of the pulp of the bananas at discharge was 56 to 58 degrees fahrenheit. With respect to two transactions on the Rio Sulaco which arrived at the port of Charleston on March 31, 1983, pulp temperatures on arrival were not shown. In addition, the temperature devices contained in the carrying portion of the truck with respect to seven of the thirteen transactions showed that the bananas were carried at temperatures at or above the minimum at which they must be carried to obviate the occurrence of chilling. Records were not provided with respect to the temperatures at which the bananas were carried

from port of loading to port of discharge by respondent. Neither did complainant provide records as to the temperatures at which it ripened the bananas after it accepted delivery. The minimum temperature at which bananas may be held over a period of time without risk of chill effect, as manifested by grey color or underpeel discoloration, is 55 degrees fahrenheit. Even if the bananas were carried at a temperature slightly below 55 degrees fahrenheit for a period up to eight hours, it is unlikely that chill effect would occur.

17. A formal complaint was filed in this proceeding on April 3, 1984. An informal complaint was filed on September 21, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

The issues in this proceeding are unique and difficult of resolution. This is particularly so because, although there were no federal inspections of the bananas either at port of discharge or at complainant's place of business with respect to the fourteen transactions at issue in this proceeding, it is clear that both parties accept the validity of inspections by respondent insofar as the accuracy of the findings is concerned. However, the parties differ as to the interpretation which should be placed upon those findings. The case is further compounded by the fact that there are no federal standards with respect to condition or quality factors for the bananas. Therefore, a necessary step in the resolution of the dispute is to determine whether, given the nature and kind of defects found in the bananas upon respondent's inspections both at point of discharge and at complainant's place of business the bananas made good delivery. In effect, the tribunal must engraft upon this case reasonable tests as to the percentage of condition defects bananas may have at destination for it to determine whether they made good delivery. We derive some help in this regard through the conduct of respondent in granting allowances. We are also helped to some extent by looking at federal standards for other fruit, and to a lesser degree by an analysis of complainant's accounts of sale, which show the extent to which complainant lost money when it resold the bananas. In addition, in those instances in which we may find the bananas did not make good delivery, we must determine whether the adjustments in price granted by respondent were appropriate.

Complainant contends that it is entitled to damages, based upon the condition of the bananas when they arrived at its place of business. Although originally it filed lesser claims based primarily on its actual costs less sales price, it now contends that it is entitled to

the difference between the price the bananas would have fetched on resale at the market had they made good delivery and their actual value as manifested by the price fetched at resale. Respondent, on the other hand, contends that complainant cannot make such a claim. It offers three theories for why its computation and proffered allowances are proper. First, it claims that the custom of the trade with respect to bananas is such that the adjustments which are awarded when the shipper of the bananas finds that the receiver is entitled to an adjustment will be based on the free on board price plus expenses such as handling, trucking, and repacking that portion of the load which was not in suitable condition upon arrival. It also claims that insofar as complainant is concerned, by virtue of a course of conduct between complainant and respondent over a period of two years with respect to settlements, complainant has accepted respondent's methodology for the settlement of claims. Third, it claims that when it submitted its initial claims complainant engaged in a course of performance in which it used the delivered costs less the value of the bananas on resale, which course of performance restricted it to respondent's method of computing damages utilizing such delivered costs, which is the same as f.o.b. pricing plus other expenses.

Before discussing whether there are standards for condition defects which may be applied, we must address respondent's intriguing claim that since there are no federally published standards by which to determine whether bananas made good delivery Chiquita cannot be held to have violated section 2 of the PACA (7 U.S.C. § 499b). Section 6(a) of the Act (7 U.S.C. § 499f(a)) provides that "Any person complaining of any violation of any provision of Section 2 of this Act . . . may "file a complaint with the Secretary." Section 6(c) of the Act (7 U.S.C. § 499f(c)) provides for investigations of such complaints, and if the investigation reveals there may have been a violation, a hearing on the issues. These are the provisions which trigger reparation proceedings such as the one with which we are concerned here.

Section 2 of the PACA (7 U.S.C. § 499b) provides in pertinent part:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * * * *
>
> (2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or

contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

It is the above-quoted provisions with which we are concerned in this proceeding.[1]

Section 6(a) of the PACA clearly contemplates that in order to initiate a reparation proceeding the complaining party must allege that there has been a violation of section 2. Complainant did so. Section 6(d) of the Act (7 U.S.C. § 499f(d)) provides in pertinent part that after oral hearing the Secretary shall determine whether a dealer has violated any provision of section 2 of the PACA. The Secretary has made such determination in prior cases involving bananas in which their condition was in issue. See *Ecuadorian Fruit Import Corporation* v. *L & S Bananas*, 18 Agric. Dec. 485 (1959); *Ecuadorian Fruit Import Corporation* v. *Matthew Mercurio*, 16 Agric. Dec. 1245 (1957). Respondent's argument that there must be published federal standards before there can be a violation of section 2 must necessarily fail. There is no requirement in the PACAthat standards be established for the largest amount of condition defects a commodity of a given grade may show and still make good delivery. Rather, the Department has established such standards, primarily for commodities which are grown domestically, as the need has arisen to assist in the federal inspection of fruits and vegetables. The lack of federal standards does not affect the principle of whether a commodity makes good delivery. Rather, such standards establish a method by which to apply the principle. The lack of such standards merely forces this tribunal to find alternative, fair methods by which to determine whether a commodity has made good delivery.

In the usual reparation case under the Perishable Agricultural Commodities Act in which a party claims that a fruit or vegetable has not made good delivery there are published standards with respect to the condition which such product must meet at point of destination, dependent upon its grade, in order to meet contract specifications. Proof of a breach of contract on the part of the seller because it did not ship goods which made good delivery is most easily done based upon a federal inspection. When the product has greater than a specified percentage of condition defects it is said not to have made good delivery, as a result of which the receiver or buyer can then claim damages based upon the differential between the price fetched on resale and the market price, or on some other

[1] Respondent's brief addressed whether this portion of section 2 and section 2(5) were applicable. Section 2(5) deals with what is known as "misbranding" rather than breaches of contract, and need not be discussed further.

formula. Here, where there are no published standards with respect to the condition of bananas at the point of destination, and where the general practice is not to obtain a federal inspection, the resolution of a dispute in which a party claims that the bananas did not make good delivery is much more difficult. Based upon the evidence in this proceeding, in which both parties acknowledge that the inspections performed by the respondent are very well performed, and accurately describe the condition of the bananas both at port and at their ultimate destination, with one exception we accept the findings in those inspection reports as being accurate, and sufficiently probative of the issue of the condition of the bananas for use in this proceeding. See *Commonwealth Fruit & Produce Company, Inc.* v. *Idaho Falls Bonded Produce & Supply Co.*, 32 Agric. Dec. 1734 (1973); *Henry Skeba* v. *Battleground Farms*, 18 Agric. Dec. 183 (1959). However, our acceptance of such reports does not resolve the ultimate question with respect to condition, which is what standard should be applied.

In *Ecuadorian Fruit Import Corporation* v. *L & S Bananas, supra*, the issue as to how to deal with condition defects in bananas was raised indirectly. However, it is helpful in this proceeding. In that case the complainant complained that the bananas were green select, whereas respondent said that they were not. A witness testified that there were four grades of classification for bananas at that time; *i.e.*, select, special (reject), turning, and ripe, and that there was a differential in price between each such grade. The witness defined select as "green, proper grade and finger size, clean and uniform". The evidence in this proceeding shows that the classification of bananas has progressed substantially from the period of time involved in *Ecuadorian Fruit*. However, it is important to acknowledge that purchasers and sellers of bananas have long known that there are various grades which result in price differentials. Indeed, in *Ecuadorian Fruit* the tribunal stated that "there was an implied warranty that the bananas would ripen properly under normal ripening procedures. Complainant knew from the nature of the business, as well as previous sales to respondent, that respondent intended to ripen the green bananas prior to selling to stores." (Id. at 489) Such is also the case here. The testimony of complainant, through its witness Michael Zurowski, showed clearly that complainant expected to receive green bananas of high quality (a condition as to which Chiquita prides itself), that it had ripening rooms of excellent quality for bananas, and that it utilized these ripening rooms after receipt of the bananas in order to get them to an appropriate stage for resale to other businesses. It is both upon the receipt of the bananas by complainant, and during the subse-

quent ripening process that the bananas underwent in complainant's ripening rooms, that the various condition defects of the bananas became clearly discernible.

One way to determine whether the bananas made good delivery is to ascertain the percentage of condition defects which is tolerable at the time of shipment to or receipt at the ultimate destination by complainant. Such resolution is consonant with applicable PACA procedures for commodities for which there are published condition standards. This method is consistent with the requirement that a seller must sell goods which are in suitable shipping condition. The warranty of suitable shipping condition placed upon a seller of goods is defined in section 46.24(j) of the regulations issued pursuant to the PACA (7 CFR § 46.24(j)) "to mean, in relation to direct shipments, that the commodity at the time of billing is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery at the destination specified in the contract of sale without abnormal deterioration." *John M. Evans Produce Co.* v. *D. L. Piazza Company*, 18 Agric. Dec. 1452, 1454 (1959). An inspection of the various allowances for condition defects with respect to certain kinds of fruit of U.S. No. 1 quality for which standards have been promulgated reveals that the percentage of condition defects permissible at shipping point ranges between 8 and 10 percent, with between 4 and 5 percent permissible serious damage at shipping point. At destination, for those commodities for which there are tolerances given the range tends to be between 10 and 12 percent with a range of 5 to 6 percent for serious damage. For U.S. No. 1 cantaloupes, at shipping point there may be 8 percent condition defects by count with not more than 4 percent serious damage, and at destination 12 percent condition defects with not more than 6 percent serious damage (see 7 CFR 51.476). For U.S. No. 1 melons there may be 10 percent condition defects by count at shipping point with not more than 5 percent serious damage. No tolerances are given at destination (See 7 CFR 51.3744). For U.S. No. 1 nectarines there may be 8 percent condition defects by count with not more than 4 percent serious damage at shipping point and 12 percent condition defects with not more than 6 percent serious damage at destination (See 7 CFR 51.3150). For U.S. No. 1 pineapples there may be 10 percent condition defects by count at shipping point with not more than 5 percent serious damage. No tolerances are given at destination. (7 CFR 51.1486). For U.S. No. 1 watermelons there may be 10 percent condition defects by count at both shipping point and destination with not more than 5 percent serious damage. (See 7 CFR 51.1973).

An analysis of the standards for the fruits and melons described above shows that 10 percent grade and condition defects, with not more than five percent involving serious damage, at shipping point, including not more than one percent decay (rot), is a reasonable standard for bananas. In order to determine whether the bananas in the 14 transactions involved in this proceeding made good delivery, we shall apply that criterion as one of the methods by which we can draw conclusions. Both parties implicitly agree that underpeel discoloration or ripe and turning bananas are serious condition defects. It is axiomatic that rot is a serious condition defect. Therefore, it is reasonable to conclude that up to eight percent serious damage by discoloration should be allowed for the bananas to make good delivery at destination on an f.o.b. sale, but not more than three percent of that amount may be decay (rot). We apply a more lenient standard at destination because tolerances for such defects are typically more lenient there than at the shipping point. See *Pope Packing & Sales, Inc.* v. *Santa Fe Vegetable Growers Cooperative, Inc.*, 38 Agric. Dec. 101, 104-105 (1979); *Denise & Filice Packing Co.* v. *Super Food Services, Inc.*, 38 Agric. Dec. 744, 746-747 (1979). Under such circumstances this tribunal has a basis by which to make the necessary threshold determination for most of the transactions as to whether the bananas made good delivery based upon percentages of condition defects.

In evaluating whether the parties agreed on the method by which damages would be computed we conclude that there is no written document which sets forth the full understanding of the parties. The invoice sent by respondent with respect to each transaction contains some terms and conditions with respect to filing claims, but does not contain a statement of the methodology by which allowances will be granted. The obverse of the invoice states in pertinent part:

> 5. *Claims*—Notice of every claim in respect of Products must be given, orally or in writing . . . within 48 hours after the Products arrive at Purchaser's ripening premises. Such Notice will specify the defect or defects complained of, the date of such arrival and the date the Products will leave the ripening premises, and must assure Company an opportunity to inspect the Products. A formal claim or Company Form SC-10 with supporting loss statement must be filed with local Company representative within 60 days after giving such notice. Purchaser shall make all reasonable efforts to minimize losses in respect of products claimed to be defective. . . .

6. *Adjustments*—Company agrees to investigate every claim made as provided above and will make prompt and fair adjustment thereof if found meritorious. Purchaser, however, shall in every instance pay to Company the full amount of the invoice without any deduction or set off whatsoever.

The above terms had been in effect for about 25 years prior to 1983. Complainant had received invoices from respondent containing those terms for at least the two years preceding the transactions in issue in this proceeding. Therefore, we conclude that it knew of them, and that even though complainant had not signed a document expressly agreeing to these terms, by course of conduct both parties have agreed to them with respect to the settlement of claims. However, other than those contained on the front of the invoices we also conclude that these are the only provisions to which the parties have agreed.

Complainant met both conditions set forth in paragraph 5, above, when it notified respondent of a claim in which it specified the defects in 11 of the 14 transactions within 48 hours of its receipt of the bananas in Cleveland. It also provided respondent with written claims for all 14 transactions in which it set forth the bases thereof along with a statement of losses within 60 days of its receipt of the bananas. In addition, complainant faithfully paid respondent the full amount of the invoices even though it had made the claims. This, of course, gave respondent a powerful tool by which to offer complainant an allowance on its own terms. Respondent also investigated each claim, and offered to make adjustments which it found to be appropriate. However, we do not read the language as to adjustments in paragraph 6 to imply that a receiver of bananas cannot challenge the validity of the allowances. Finally, complainant did not accept the amounts which were tendered as full settlement of the claims.

The above discussion provides the necessary backdrop to discuss respondent's contentions that complainant must accept the amounts tendered to it as full settlement of its 14 claims. Respondent set forth three alternative, but not necessarily mutually exclusive, reasons for its contention that pursuant to the Uniform Commercial Code, hereinafter U.C.C., complainant is precluded from recovering more than it was offered in settlement.[2] It claims that by

[2] All references to the Uniform Commercial Code are to the Ninth Edition, 1978, nerican Law Institute and National Conference of Commissioners On Uniform ate Laws.

virtue of usage of trade (industry practice), course of conduct, or course of performance, the complainant has accepted its methodology of granting allowances based on the f.o.b. price of bananas plus necessary expenses such as transportation and handling when the bananas have condition defects.

Section 1-205(2) of the U.C.C. defines usage of the trade as:

> . . . any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts.

Note 4 to 1-205(2) of the U.C.C. states that usage of trade is "a factor in reaching the commercial meaning of the agreement which the parties have made." It does not "displace or negate 'established rules of law.'" Pursuant to Note 5 a usage of trade need not be "ancient or immemorial." Rather, there must be "regularity of observance." As the proponent of the claim that by usage of the trade settlements for bananas that do not meet contract terms are based on f.o.b. price plus other necessary costs respondent has the burden of proof. *International Produce Distributors, Inc.* v. *A & L Produce Co., Inc.*, 31 Agric. Dec. 356 (1972); *Santelli* v. *Rubinstein*, 21 Agric. Dec. 1053 (1962); *Spada Distributing Co.* v. *Frank Kenworthy Co.*, 17 Agric. Dec. 347 (1958). Based on our analysis of the facts in this case we conclude that respondent has failed to prove that all banana dealers grant allowances for shipments which do not meet contract specifications based on f.o.b. price plus necessary expenses. Respondent provided testimony that it does so. It provided somewhat murky testimony that Castle and Cooke does so. The business of those two companies encompasses about 60 percent of the banana business in the United States. Even construing the testimony in the light most favorable to respondent we cannot conclude that respondent has proved that its allowance procedures with respect to bananas rise to the point where they are customary in the trade. At a very minimum such a conclusion could be drawn only after extensive review of testimony by buyers rather than self-serving statements made by sellers, and the custom would have to be established through numerous cases of actual practice, and not through the opinion of a witness. *Coast Marketing Company* v. *World Wide Produce Company*, 30 Agric. Dec. 1742 (1971); *California Fruit Exchange* v. *Spracale Fruit Co.*, 89 F. Supp 580 (W.D. PA, 1950). Even more important is the fact that respondent failed to provide meaningful explanations as to why it gave allowances in the amounts it did, and in some instances denied them, with re-

spect to the 14 transactions in issue here. It certainly did not prove that the trade grants allowances without giving fuller explanations than were given to complainant as to how the computations were arrived at, or that receivers are denied an opportunity to negotiate final settlements.

Section 1-205(1) of the U.C.C. defines course of dealing as:

> . . . a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

This provision should be read in conjunction with section 2-208(1) of the U.C.C. which provides that:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

The parties dealt with each other on a weekly basis under the common contract provisions written by respondent for two years prior to the 14 transactions which are involved in this proceeding. However, that there were many prior transactions does not indicate that complainant accepted or acquiesced in the claims procedures followed by respondent. The record shows that complainant had an opportunity to object to those procedures on only three occasions prior to March 1983. It filed claims for allowances based on its belief the bananas involved did not meet contract specifications only on those three occasions. Furthermore, for the latter two claims, which arose in November 1982, complainant strongly expressed its dissatisfaction with respondent's settlement procedures in a letter to respondent dated December 29, 1982.[3] Even though it also accepted the settlement of another claim on respondent's terms after it made the 14 claims with which we are concerned, there are not sufficient claims in which complainant accepted re-

[3] Complainant stated:

> "It is with much regret that I return these 2 claim files accepting your ridiculous offer of settlement, and simply because we are closing our books for the fiscal year and I do not have the time, nor the accessability to the necessary records at this time, to be able to photostat the copies of each ticket to prove my loss, though at any other time I guarantee you I would subpoena all your records to make you prove how you arbitrarily amongst yourselves came up with a figure like you did."

spondent's proposed settlement for us to conclude it acquiesced in its methodology. This is particularly true in view of complainant's vociferous opposition to the two November settlements, and the fact it did not accept the proffers on the 14 transactions. Therefore, we conclude that there has not been a course of dealing or performance which gives rise to the conclusion that respondent's claim settlement procedures are acceptable to both parties.

Singer's requested damages in the amount of $66,697.25 in its formal complaint filed on March 15, 1984. In an Order dated September 18, 1984, the Secretary ordered respondent to pay $9,286.00, the amount it admitted it owed complainant. That left for resolution in this proceeding a claim of $57,411.25. However, paragraph 5 of the contract between the parties, as shown on the reverse side of every invoice for each of the 14 transactions provides that "a formal claim . . . must be filed . . . within 60 days after giving . . . notice [of a claim]". Having dealt with respondent for two years, during which period the same contract was always utilized for many transactions, complainant is charged with knowledge of the provision, and with having accepted it terms, thereby giving rise to a course of performance as provided in section 2–208(1) of the U.C.C. Since the last transaction involved in this proceeding occurred on May 31, 1983, more than 60 days elapsed with respect to all of them prior to the filing of the complaint. Therefore, complainant is limited to no more than it claimed in the formal written claims it filed with respondent within 60 days of the receipt of the bananas with respect to each transaction. The total amount of such claims was $35,691.57, less $9,286.00 already paid by respondent, or $26,405.57. The original individual claims, as lumped together by date of discharge of the bananas from each of five ships, appear to have been based on the difference between complainant's total costs, including contract price, fuel surcharge, transportation, temperature recorders and handling, and the total price fetched on resale, as shown by accounts of sale for each transaction. Under these circumstances complainant did not originally claim lost profits, and as discussed previously, cannot do so now.

In view of our findings that bananas are subject to regulation under the P.A.C.A. even though there are no published grade standards with respect to good delivery, and that certain provisions of the U.C.C. which would insulate the parties from coverage under the PACA are not applicable in this instance, it is necessary to de-

termine the extent to which complainant is entitled to damages. Our analysis of Singer's claims follows.[4]

1. Transactions No. 1 through 3—Rio Babahoya; docked at Albany, New York with unloading March 23, 1983.

The Rio Babahoya docked at Albany, New York, and respondent's bananas were unloaded from that vessel on March 23, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $10.00 per carton with respect to each load. One truck carrying 875 cartons of bananas arrived at complainant's place of business March 24, 1983. The other two trucks, one with 870 cartons and the other with 850 cartons of bananas arrived on March 25, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $25,950 for the 2,595 cartons of bananas, respondent invoiced complainant $1,038.00 as a fuel surcharge, $934.20 for handling charges and $45.00 for temperature recorders for two of the three trucks, for a total contract price for the three transactions of $27,967.20. Complainant made timely payment of this amount to respondent. In addition, complainant paid $1,742.31 for freight, bringing its total costs to point of destination to $29,709.51.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Babahoya. The inspection showed that seven percent of the cartons were ripe and turning, thereby constituting a significant condition defect.

When the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent on March 25, 1983, that it believed they were not in accordance with contract specifications. Chiquita responded to the complaint by performing an inspection on March 28, 1983. After that date complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "fruit was showing a chill effect w/out any other characteristics of chill except the grey cast to the peel. All temperatures w/in tolerance." In the remarks section of

[4] Respondent claimed that an adverse inference should be drawn from complainant's failure to provide temperature charts to show the temperatures at which the bananas were maintained after they were unloaded. We decline to do so because for the most part complainant filed prompt complaints with Chiquita, indicating that the problems existed at the time of delivery. While we are tempted to draw adverse inferences from respondent's failure to provide charts showing the temperatures on board the ship even though such charts were requested by Singer's prior to hearing, we shall not do so primarily because the issues can be decided without invoking adverse inferences.

that same form respondent wrote "complaint on discoloration (and after ripening) on arrival. Customer requested our QC inspection". The inspection showed with respect to the load which arrived on March 24, 1983 that 8 percent of the bananas were ripe and turning or ripe. With respect to the truckload containing 850 cartons which arrived on March 25, 1983 it showed 14 percent of the cartons were ripe and turning or ripe. The record does not show a quality control report at destination for the third truckload. However, based on the discharge inspection and the other two inspections at destination we find that the preponderance of the evidence shows it did not make good delivery, particularly since Chiquita granted a $4,000 allowance without distinguishing between the three loads. In addition respondent either did not look for or did not find any underpeel discoloration, which would reflect chill damage.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $7,402.75 for the load which arrived March 24, 1983, and $8,846.00 and $8,056.25 for the other two loads for total sales of $24,305.00. This is $5,404.51 less than its computed costs for the 2,595 cartons of bananas. Complainant claimed $5,766.85 as its total losses on the three loads. The $362.34 difference is unexplained. Respondent offered $4,000.00 in full settlement without giving complainant the benefit of an explanation as to why it was doing so.

We find, based on our review of the evidence with respect to the three truckloads of bananas, that they did not meet contract specifications when they were delivered to complainant. Respondent dealt with the three loads as if they were one unit. It implicitly acknowledged that bananas that were at least 8 percent and as much as 14 percent ripe and turning or ripe at the time of delivery were defective when it granted a $4,000.00 allowance. While it provided a rationale for the amount granted at hearing in the form of a worksheet, this was not a document to which complainant was privy at the time the allowance was granted. Rather, it constituted respondent's unilateral determination as to the amount of the allowance it wanted to grant. The best evidence of the damages suffered by complainant are its three accounts of sale, which reflect the total prices fetched for the three transactions. The difference between its computed costs and the total price fetched on resale is the appropriate measure of damages in this instance. That amount is $5,404.51. We will disallow the additional claim of $362.34 as being unsupported by the evidence. Respondent has previously paid

complainant a $4,000.00 allowance. Therefore, we shall award complainant $1,404.51 with respect to these three claims.

2. Transactions No. 4 through 7—Rio Sulaco; docked at Charleston, South Carolina with unloading March 31, 1983.

The Rio Sulaco docked at Charleston, South Carolina, and respondent's bananas were unloaded from that vessel on March 31, 1983. Four truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $9.00 per carton with respect to each load. Two trucks arrived at complainant's place of business April 2, 1983. One truck carried 850 cartons of bananas, and the other carried 848 cartons. One truck carrying 848 cartons arrived at complainant's place of business on April 4, 1983, and the fourth truck, carrying 850 cartons, arrived on April 5, 1983. All four truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $30,564.00 for the 3,998 cartons of bananas, respondent invoiced complainant $90.00 for four temperature recorders, a fuel surcharge of $1,358.40, and handling charges of $1,154.64 for a total contract price for the four transactions of $33,167.04. Complainant made timely payment of this amount.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Sulaco. The inspection showed scorable defects ranging from 3.4 percent to 4.1 percent depending on the hold from which the bananas were taken. Ripe and turning bananas ranged between 0.8 percent and 1.5 percent of the cartons, which is not a significantly high percentage of defects.

When the bananas had been unloaded into its ripening rooms from the trucks complainant gave oral notice to respondent with respect to the truckloads which arrived on April 2, 1985 that it believed the bananas were not in accordance with contract specifications because they had a grey color, and with respect to the other two truckloads which arrived on April 4, 1983 and April 5, 1983, that they were ripe and turning. Respondent was not able to inspect the bananas immediately. Therefore, complainant kept them in its ripening rooms while it sold other bananas. Respondent performed an inspection on April 13, 1983.

After April 15, 1983, complainant filed its written complaint and statement of damages with respect to the two loads of bananas which arrived on April 2, 1983. It set forth as the basis of its claim that "upon ripening and some on arrival, the fruit was turning a grey color, as if to show chill, without any other characteristics of chill and temperatures within tolerance." In the remarks section of that same form respondent wrote "Soft and breaking fruit on arriv-

al." The destination inspection showed with respect to these two loads that 30 percent of the bananas had underpeel discoloration.

After April 11, 1983 complainant filed its written complaint and statement of damages with respect to the two loads of bananas which arrived on April 4, 1983 and April 5, 1983. It set forth as the basis of its claim that "upon ripening fruit had a grey cast as if to show chill effects without any other characteristics of chilling and temperatures within tolerance." In the remarks section of that same form respondent wrote "ripe & turning". The destination inspection showed with respect to these two loads that 30 percent of the bananas had underpeel discoloration.

Complainant kept careful records of its sales with respect to the four truckloads involved. The accounts of sale showed that the bananas fetched $8,329.50 and $6,919.25 for the first two truckloads, and $6,459.00 and $6,959.50 for the second two loads for total sales of $28,667.25. This is $8,661.18 less than its computed costs for the 3,998 cartons of bananas, which includes $3,483.99 for transportation and $678.40 for handling in addition to the sales price and other fees paid to respondent. Complainant claimed $3,247.25 with respect to the first two transactions, and $4,745.66 with respect to the other two transactions, for a total claim of $7,992.91. Respondent granted no allowance with respect to the first two transactions, and offered $1,365.00 for the other two, leaving $6,627.91 as the total claim for which it did not grant an allowance. Respondent explained to complainant that it declined to grant an allowance for two truckloads, because there was no underpeel discoloration at discharge, and gave less of an allowance than complainant requested on the other two without an explanation.

We find based on our review of the evidence with respect to the four truckloads of bananas that the second two truckloads did not meet contract specifications when they were delivered to complainant. Respondent implicitly acknowledged that there were condition defects warranting the grant of an allowance when it offered complainant $1,365.00. Unfortunately, its reasons are murky, at best. The issue as to whether respondent should have granted more allowances turns on our determination of which party was responsible for the underpeel discoloration on these two loads.

Both parties agree that underpeel discoloration is a serious condition defect. Both parties agree that it arises only as a result of chill damage. It is also the case that underpeel discoloration is sometimes noticeable because the outer skins of the bananas have a dull grey cast to them. However, the best way to tell whether there is underpeel discoloration is to peel back the skin of the

banana and look at its underside. Speckling or spots indicates there is underpeel discoloration.

That underpeel discoloration was not found when the Rio Sulaco was unloaded in Charleston does not mean the chill giving rise to this condition had not yet occurred. The condition does not appear immediately upon chilling the banana. Thre are no temperature records to show the hold temperatures on board ship. These records were requested of but not furnished by respondent.

With respect to the second two truckloads of bananas the pulp temperature when the bananas were unloaded was 58° to 60° fahrenheit. The pulp temperature on arrival of one of the two trucks was 60° to 65° fahrenheit. None was shown for the other truck. Temperature ranges for the two trucks while they were in transit were not provided.

Based on our review of all the evidence we conclude that the second two truckloads of bananas delivered to complainant from the Rio Sulaco did not make good delivery. The pulp temperatures at discharge from the ship were 58° to 60° fahrenheit. The pulp temperatures at the time of arrival of the trucks were at or above those at the time of unloading from the ship. Complainant filed complaints as to the condition of the fruit immediately upon accepting delivery. The inspection was not held until between eight and eleven days after the arrival of the fruit, during which time complainant carefully monitored the ripening process. While it is true the chill could have occurred during this period, we believe it is likely it occurred while the bananas were on the ship because by offering partial reimbursement respondent admitted there were problems with the bananas on arrival in Cleveland, and there was no showing of defects other than underpeel discoloration. Under the circumstances it should have granted a full allowance based on complainant's proved losses. The fact that the inspection was held 8 days after arrival is subsumed by respondent's grant of a partial allowance.

With respect to the two loads which arrived on April 2, 1983, respondent must prevail. The distinction in facts between these two loads and the two on which we have awarded damages is that there is no admission by respondent as to its liability. The inspection by Chiquita for all four loads was so distant in time from the arrival of the trucks at complainant's place of business that we cannot ascribe responsibility for the condition defects found to one party as opposed to the other. Therefore, having accepted the goods by unloading them, complainant had the burden to prove respondent was responsible for the defects. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato*

Co. v. *the Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). It failed to sustain that burden.[5]

We accept complainant's accounts of sale and computations of costs as accurate. Complainant lost $4,745.66 on the two loads for which we are awarding damages. However, since respondent granted an allowance of $1,365.00 for them, we shall award damages of only the difference, or $3,380.66.

3. Transactions No. 8 through 10—Chion Trader; docked at Charleston, South Carolina with unloading April 7, 1983.

The Chion Trader docked at Charleston, South Carolina, and respondent's bananas were unloaded from that vessel on April 7, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $9.50 per carton with respect to each load. One truck carrying 875 cartons arrived at complainant's place of business on April 11, 1983, and two trucks, each carrying 850 cartons, arrived on April 12, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $24,462.50 for the 2,575 cartons of bananas, respondent invoiced complainant $1,030.00 as a fuel surcharge, $875.50 for handling, and $67.50 for temperature recorders, for a total contract price for the three transactions of $26,435.50. Complainant made timely payment of this amount to respondent. In addition, complainant paid $2,771.20 for freight, bringing its total costs to point of destination to $29,206.70.

Respondent followed its usual practice of inspecting the bananas for various defects when they were unloaded from the Chion Trader. Among other findings the inspection showed that 18 percent of the cartons of bananas from hatch 3 showed underpeel discoloration.

When the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent that it believed they were in accordance with contract specifications. Respondent came to complainant's place of business, and performed an inspection on April 13, 1983. At some time after April 12, 1983 complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "upon ripening fruit was showing an off-color cast of grey as if to show chill without any other characteristics of chill and temperatures O.K. on arrival". In the remarks portion of that same form respondent wrote "QC in-

[5] Complainant need not have waited for Chiquita's inspectors to arrive. Federal inspection service is available in Cleveland, Ohio. Complainant was free to secure and rely on the results of such an inspection. It should have done so under these circumstances.

spection after ripening brown discoloration". The inspection showed with respect to two of the three loads that 35 percent (for the load arriving April 11, 1983) and 42 percent (for one of the loads arriving April 12, 1983), of the clusters did not meet specifications. This is very high in both instances. There was no quality control inspection shown for the third load of bananas. The certificates also appear to show that there was considerable underpeel discoloration.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $8,561.00 for the load which arrived on April 11, 1983, and $8,062.00 and $7,748.75 for the loads which arrived on April 12, 1983, for total sales of $24,371.75. This is $4,834.95 less than its computed costs for the 2,575 cartons of bananas. Complainant claimed $4,954.51 as its total losses on the three loads. The $119.56 difference is unexplained. Respondent offered $2,000.00 in full settlement for one of the truckloads containing 850 cartons because the bananas for that load were known to have come from a hold in which excessive underpeel discoloration was found. The record does not reflect which truck was involved. The amount of money, however, most closely approximates the segregated claim by complainant for $1,924.25, and we will ascribe the allowance to that truckload. The inspection report which showed that 35 percent of the clusters did not meet specifications clearly related to the truck which arrived on April 11, 1983 with 875 cartons of bananas.

We find based on our review of the evidence with respect to the three truckloads of bananas that the two loads for which inspections were provided did not meet contract specifications when they were delivered to complainant. The inspections were made either one or two days after the bananas were received and accepted, with percentages and types of defects which were too high to be ascribed to deterioration while in transit and after delivery. With respect to the third load complainant has failed to meet its burden of proof that the bananas did not make good delivery, particularly since respondent treated each truckload separately, and our finding of liability is dependent on the results of inspections. Respondent has made full compensation with respect to one load which did not make good delivery, as discussed above. With respect to the third load involving 875 cartons we find complainant's claimed loss of $1,419.26 to be proved by the evidence, and we shall award complainant that amount.

4. Transactions No. 11 through 13—Rio Babahoya; docked at Albany, New York with unloading May 4, 1983.

The Rio Babahoya docked at Albany, New York, and respondent's bananas were unloaded from that vessel on May 4, 1983. Three truckloads of bananas were sold to complainant, f.o.b. port of discharge. The sale price was $11.50 per carton with respect to each load. Each truck contained 850 cartons. One truck arrived at complainant's place of business on May 5, 1983, and the other two trucks arrived on May 6, 1983. All three truckloads were received, accepted and unloaded by respondent on arrival. In addition to the $29,325.00 for the 2,550 cartons of bananas, respondent invoiced complainant $1,020.00 as a fuel surcharge, and $918.00 for handling, for a total contract price for the three transactions of $31,263.00. Complainant made timely payment of this amount to respondent.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Rio Babahoya. The inspection showed three percent of the cartons from hold number 4, the hold from which Singer's bananas were taken, were ripe and turning, and that overall there were a number of condition defects. The inspection at discharge did not reveal any underpeel discoloration.

After the bananas had been unloaded into its ripening rooms from the trucks, complainant gave oral notice to respondent on May 11, 1983, that it believed they did not meet contract specifications because they showed underpeel discoloration and were old. Respondent made an inspection of the three truckloads of bananas on May 13, 1983. On or after that date complainant filed its written complaint and statement of damages. It set forth as the basis for its claim that "These loads appeared to be old fruit. Upon arrival showed a slight discoloration, as if they were chilled, but temperatures were within tolerance. Upon ripening showed excessive discoloration and scarring with deep bruises—crown mold and occasional rot." Respondent did not enter comments in the "remarks" section of the complaint form.

The inspection showed "fruit appears fairly decent at end but after processing too many show poor color but most not from chilling", and "100 boxes examined—sample divided between 3 rooms of the 3 loads all gassed—avg color of all clusters 3—3½ OC—scattered throughout—34% med/sev—5%—off color from chilling 15%—Med/sev. 4%. Mostly large full mature fruit, 5% of boxes clusters showing ugly brownish outer peel discoloration and excessive amounts of CM/CR—NI/NR very mixed appearance, poor to

fair." [6] The bananas were obviously not in good condition on May 13, 1983.

Complainant kept careful records of its sales with respect to the three truckloads involved. The accounts of sale showed that the bananas fetched $8,343.75, $7,086.00, and $7,061.50, for total sales of $22,491.25. This is $10,563.20 less than its computed costs for the 2,550 cartons of bananas, which is comprised of the $31,263.00 invoiced by respondent and $1,791.45 for hauling, or a total of $33,054.45. Complainant originally claimed $10,608.20 as its total losses on the three loads. The $45.00 differential is probably a deduction for unloading one of the trucks. Respondent declined to grant any allowance on the three loads on the grounds that:

> Discharge reports do not show any evidence of underpeel discoloration at discharge. Further, boxing dates indicate no excessive age of fruit at loading or at discharge.
>
> Although our Quality Control inspector did find off-color fruit at your location on May 13, 1983, it is our contention that the fruit was damaged by improper conditions during transit or ripening. To further support this, the carrier report on Lot 440 indicates that the load arrived in Cleveland on May 5, "but could not deliver due to cooler problems."

We find based on our review of the evidence with respect to the three truckloads of bananas that complainant did not prove they did not meet contract specifications when they were delivered to it. It did not file a claim within 48 hours of accepting the bananas, as required by the contract, which defense was not raised by respondent, but which is recognized here. Additionally, the record shows that the bananas were on board the Rio Babahoya for about 12 days, which is a long time. The pulp temperatures of the bananas were 57§ to 60° Fahrenheit when they were unloaded from the ship. On arrival at Singer's in Cleveland the pulp temperatures were 57° to 60°, 59° to 60°, and 62° to 65°, respectively. All these temperatures are all right, although those for the latter truck are somewhat high. Of great importance is the fact that respondent found a low percentage of ripe and turning and no underpeel discoloration at the time the bananas were unloaded from the ship, even though they had been in transit a long time. Furthermore, complainant did not file an oral complaint with respondent until May 11, 1983, six days after the first load had arrived, and five

[6] CM is not defined in the record. OC means off color. CR means crown rot, NI means neck injury, and NR means neck rot.

days after the other two arrived. The bananas were admittedly old when they were inspected. Some were off color, with 15 percent of them experiencing underpeel discoloration. Another five percent of the fruit had other condition defects. Unfortunately for Singer's, having accepted the bananas it has the burden to show that they did not make good delivery. *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato Co.* v. *The Kaufman Brown Potato Company*, 16 Agric. Dec. 1055 (1957). In this instance it did not provide enough evidence for us to conclude such was the case. We are particularly impressed by its failures to complain about the condition of the bananas when it received them or to provide temperature charts for the inland transit and the seven and eight day periods between the arrival of the fruit and when it was inspected. These charts were critical to its proof in this instance because the percent of defects of various kinds cannot be said to be of such a nature and amount that they could occur only prior to unloading from the ship, and not after arrival at complainant's place of business.

5. Transaction No. 14—Olancho; docked at Albany, New York with unloading May 27, 1983.

The Olancho docked at Albany, New York, and respondent's bananas were unloaded from that vessel on May 27, 1983. One truckload of bananas was sold to complainant, f.o.b. port of discharge. The sale price was $10.00 per carton for 850 cartons or $8,500.00, plus charges for a fuel surcharge, handling and a temperature recorder of $678.00, for a total cost of $9,178.00. The truck arrived at complainant's place of business on May 31, 1983, and was received, unloaded and accepted. Complainant immediately complained to respondent about the condition of the bananas. Subsequently, complainant made timely payment in full.

Respondent pursued its usual practice of inspecting the bananas for various defects when they were unloaded from the Olancho. It showed that 90 percent of the clusters met specifications.

After the bananas had been unloaded into its ripening rooms from the truck complainant immediately gave oral notice to respondent that it believed they did not meet contract specifications because they were old, had mold, were ripe and turning, were scarred, and were short. It filed its formal written complaint and statement of damages on July 20, 1983. It set forth as the basis of its claim that "This load was absolute *garbage*. The *WORST* load of bananas I ever received since entering the banana business."

Respondent inspected the bananas on June 1, 1983. The inspection showed that only 45 percent of the clusters of bananas met specifications. The report stated in pertinent part:

> R & T 4%, 1 Cluster in each of 2 boxes color 6+, balance of all clusters 2-2½, fruit breaking (Not gassed)—(5 boxes examined for PCMS—Score 45 Heavy SR 50%—Very large full mature fruit, very long fingers (difficult to pack)—about 5% C.M.—overall poor appearing quality, dull color and dirty appearance.

The bananas were obviously not in good condition on June 1, 1983, only four days after they were unloaded from the Olancho. Based on respondent's own inspection report we have no choice other than to conclude that the bananas did not make good delivery, particularly since the in-transit temperatures from dock to Singer's place of business were in the acceptable range, 58° to 64°, with the high temperatures occurring only for a short period.

Complainant kept careful records of its sales with respect to the truckload of bananas. The account of sales showed that the bananas fetched $3,424.50 on resale. This is $5,753.50 less than its computed costs of $9,178.00. Complainant originally claimed $6,369.10 as its total losses. Respondent granted an allowance of $1,921.00 without giving any explanation as to its reasons for doing so. Respondent is liable for the differential of $4,448.10.

In summary we have found that respondent has failed to grant allowances to complainant in the following amounts:

1.		
2.	Transactions 1-3	$1,404.51
3.	Transactions 4-7	3,380.66
4.	Transactions 8-10	1,419.26
5.	Transactions 11-13	0.00
	Transaction 14	4,448.10
	Total	$10,652.53

Its failure to pay complainant $10,652.53 in 11 transactions constitutes violations of section 2 of the PACA for which reparation should be awarded with interest.

As the prevailing party complainant is entitled to reasonable attorney's fees and expenses. *Bill Offutt, Inc.* v. *Marvin E. Berry*, 37 Agric. Dec. 1218, 1225 (1978). It filed a timely request for reimbursement, and respondent did not file any objection to the claim. The total amount requested by complainant was $6,482.10, which included $4,375 for attorney's fees. We find the claim appropriate.

Therefore, complainant should be awarded $6,482.10 for fees and expenses.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $6,204.43, with interest thereon at the rate of 13% per annum May 1, 1983 until paid.

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $4,448.10, with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

Within 30 days from the date of this order respondent shall pay fees and expenses to the complainant, as reparation, in the amount of $6,482.10, with interest thereon at the rate of 13% per annum from the date of this order until paid.

Copies of this order shall be served upon the parties.

BARTON WILLOUGHBY d/b/a WILLOUGHBY FARMS, *v.* FRITO-LAY, INC., PACA Docket No. 2-6614. Decided May 1, 1986.

Agreement to grow potatoes—statute of frauds—oral modification of written contract—agency—apparent authority—estoppel—reparation awarded.

Where employees of respondent dealt exclusively with complainant regarding his crop of potatoes, and in doing so induced him to delay delivery beyond dates provided in written contract, the respondent is held to have given such agents apparent authority to modify the contract on its behalf. It is held that an oral modification of a written contract does not violate the statute of frauds. Further, having relied to his detriment on the promises of respondent's agents, complainant may claim that respondent is estopped to deny that the contract was modified.

Dennis Becker, Presiding Officer.
Stephen P. McCarron, Esquire, Silver Spring, MD, for complainant.
Joseph Nealon, Esquire, Washington, DC, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $84,825.83 in connection with a transaction involving the sale and shipment of chipping potatoes in interstate commerce. Respondent filed a counterclaim in which it seeks a refund of an alleged overpayment for the potatoes it bought from complainant in the amount $1,790.15.

A copy of the formal report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Since the amount claimed in the complaint exceeds $15,000.00, and respondent requested an oral hearing, such oral hearing was held in Washington, D. C., on April 16 and 17, 1984. One witness testified on behalf of complainant, and two witnesses testified on behalf of respondent at the hearing. In addition, several depositions were placed in evidence by the parties. Complainant amended its complaint after evidence had been taken, as a result of which the hearing was held open for a period of ninety days to enable respondent to determine whether it wished to offer other evidence. Respondent determined it did wish to do so, and the oral hearing was concluded on September 19, 1985. Subsequent to the hearing both parties filed briefs and claims for fees and expenses. Complainant filed an objection to respondent's request for fees and expenses.

FINDINGS OF FACT

1. Complainant, Barton Willoughby, (hereinafter either "Mr. Willoughby" or "complainant") is an individual doing business as Willoughby Farms, with an address at P.O. Box 117, Gordon, Alabama. As a producer he was not subject to license under the Act during the period in issue in this proceeding.

2. Respondent, Frito-Lay, Inc., (hereinafter either "Frito-Lay" or "respondent"), is a corporation with an address at P.O. Box 35034, Dallas, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. In 1982 complainant and respondent initiated talks with respect to whether complainant would grow chipping potatoes for resale and delivery to respondent. As a result of those discussions a written contract was entered between complainant and respondent on January 24, 1983, under which complainant was to grow for sale to respondent 25,000 hundredweight of chipping potatoes at a price of $5.50 per hundredweight, f.o.b., U.S. Commercial, 90 percent U.S. No. 1, and which were to be size "A". 8,000 hundredweight were to be delivered to respondent during the week of June 13, 1983, 8,000 hundredweight were to be delivered to respondent during the week of June 20, 1983, and 9,000 hundredweight were to be delivered to respondent during the week of June 27, 1983. The contract further provided in pertinent part that:

"All potatoes shipped under this contract guaranteed to chip to Frito-Lay's satisfaction upon arrival. Frito-Lay reserves the option of not accepting deliveries which do not meet the above shipping schedules.

* * * * * * *

Purchaser may at any time return to seller at seller's expense any portion of goods listed herein, when in the opinion of purchaser in its sole discretion such goods do not chip to its satisfaction and purchaser, at its election, shall be entitled to receive from seller for such returned goods full credit therefor or replacement thereof with goods that do chip to purchaser's satisfaction. Seller guarantees proper loading according to carriers' tariff specifications and guarantees lowest through rate.

Seller's obligations hereunder shall not be mitigated or reduced in any way by virtue of seller's having obtained or purchased seed potatoes from purchaser to produce the potatoes to be shipped hereunder."

4. In late February and early March 1983 complainant bought sufficient quantities of seed potatoes from respondent to enable it to plant 103 acres of its fields with potatoes so as to be able to make delivery to respondent of 25,000 hundredweight in accordance with the contract terms set forth in paragraph 3, above. The seed potatoes were known as FL-162 Potatoes, which is a special type of potato developed by respondent because it chips well. In entering into the contracts for the purchase of such seed potatoes, complainant agreed that "the potatoes produced from the above seed cannot be sold or disposed of without the expressed permission (documented) by Frito-Lay, Inc." The contracts also provided that "Confirmation contingent upon grower having a 1983 Frito-Lay chip contract. . . ."

5. Respondent received two shipments of seed potatoes on February 26, 1983, and either February 28, 1983, or March 1, 1983, respectively. It is not known when other shipments of seed potatoes were received by complainant. Complainant let such potatoes lie for about two weeks so as to prepare them for planting. Some of the FL-162 seed potatoes had been planted by March 15, 1983.

6. Respondent eventually planted 103 acres of FL-162 seed potatoes. Complainant anticipated that it would harvest a yield of about 250 hundredweight of potatoes per acre. It takes between ninety and 110 days to grow FL-162 potatoes to a maturity at

which they are size "A", which size is 1 and 7/8 inches in diameter or larger.

7. Harold Willingham was the regional representative of respondent. He was the primary individual during the period March through July 1983 with whom complainant dealt insofar as the contract was concerned. Complainant also dealt with Michael Anderson, a subordinate employee to Mr. Willingham, during a portion of the months of June and July 1983 because Mr. Willingham was on vacation. Mr. Anderson acted as Mr. Willingham's substitute during that period. Both Mr. Willingham and Mr. Anderson had authority to deal directly with complainant, although to an undetermined extent they in turn were supervised by their home office in Dallas, Texas. By virtue of their actions in dealing with Mr. Willoughby, he properly relied upon their representations as being binding upon respondent.

8. During the week of June 13, 1983, complainant and Harold Willingham discussed the contractual agreement under which complainant was to deliver 8,000 hundredweight of potatoes to respondent. Complainant stated that his potatoes could use more sizing because they were late in maturing, and that not more than 75 percent of them were size "A". He felt that if he waited until later in the month he would have a higher percentage of size "A" potatoes. Complainant could have delivered 8,000 hundredweight of potatoes during the week of June 13, 1983, had it been necessary for him to do so. However, in doing so he would have seriouly jeopardized his ability to deliver the remaining 17,000 hundredweight of potatoes in the ensuing two weeks because he would have had to dig too many acres of potatoes to make the total 8,000 hundredweight. Respondent, through Mr. Willingham, expressed its willingness to delay taking delivery of the potatoes because the crop in that area of the South was late in maturing due to weather conditions, and other plantings in which Frito-Lay had an interest needed to be harvested first. In particular, respondent had not taken delivery of a large quantity of potatoes from Baldwin County, Alabama. Those potatoes were grown in accordance with joint ventures between respondent and various farmers whereby both respondent and the farmers split the costs and profits. This business arrangement had been going on for several years prior to 1983. The parties mutually assented to a delay in delivery of the potatoes.

9. During the week of June 20, 1983, complainant and either Mr. Willingham or Mr. Anderson again discussed delivery of potatoes by complainant to respondent under the contract. Respondent's agent told Mr. Willoughby that respondent did not wish to take his potatoes during that week because there had been a further delay

in the harvest of the potatoes in Baldwin County, Alabama, and respondent wished to clear out those potatoes first. Mr. Willoughby indicated that he was able to deliver 8,000 hundredweight of potatoes during the week of June 20, but agreed to delay delivery for the benefit of both parties because he knew that his potatoes could size up better if there were a delay. Respondent's agent assured him that Frito-Lay was interested in taking all of his potatoes.

10. Mr. Willingham went on vacation after the week of June 20, 1983, and Mr. Michael Anderson substituted for him during the time he was on vacation. During the week of June 27, 1983, complainant was willing to deliver as many potatoes as respondent would take. However, on Monday, June 27, 1983, in a discussion with Mr. Anderson in which he and Mr. Anderson discussed the status of complainant's crop, he expressed a willingness to delay harvest. This was done primarily for the benefit of respondent, although there was some benefit to complainant because the potatoes would grow a little more. Mr. Willoughby acceded to Frito-Lay's desires more than he sought the delay in the harvest. On June 29, 1983, however, Mr. Willoughby asked Mr. Anderson to send him purchase orders so that he could dig the potatoes and deliver them to respondent. Mr. Anderson said he would try to get purchase orders. Mr. Anderson was not able to do so after checking with Dallas, Texas, except for one order, and he and Mr. Willoughby agreed that the first load of potatoes should be dug on Thursday, June 30, 1983. Mr. Anderson provided a purchase order for this purpose. The potatoes were dug, delivered to respondent, received, and accepted. However, no other purchase orders were provided to complainant during that week.

11. It is the practice of Frito-Lay in Alabama that potatoes for which it has contracted should not be dug unless a purchase order is first provided to the farmer. This is necessary because potatoes in that region do not store well once they have been dug. Complainant knew that this was the practice of respondent even though he had never farmed potatoes previously. It was also the practice of respondent to work with a farmer with which it had contracted to assure that the potatoes which he had planted under contract were bought by Frito-Lay. It was not unusual for Frito-Lay to delay taking the potatoes from a specific farmer because of its own particular needs insofar as production of potato chips is concerned. Respondent was able to control its receipt of potatoes through use of the purchase order. Unless a farmer received a purchase order for a truckload of potatoes the farmer was not in a position to deliver them to respondent. Complainant was aware of the practice of Frito-Lay to delay receipt of potatoes which it had con-

tracted for, and was willing to deal with the respondent on the verbal understandings that eventually respondent would accept his potatoes. During the week of June 27, 1983, complainant was ready and able to deliver all the potatoes to respondent. He was diligent in his request for the provision of purchase orders during that week. He was willing, however, because of the practice of Frito-Lay to extend the period of a contract, to wait to deliver them. Effectively, complainant was precluded from digging potatoes during the week of June 27, 1983, with the exception of the one load which was dug, by the actions of respondent in requesting him to delay, and because respondent did not provide him with purchase orders.

12. July 4, 1983, fell on a Monday. On July 5, 1983, Michael Anderson visited complainant at his farm to talk to him about his crop. Complainant was insistent on that date that respondent allow him to dig his potatoes and deliver them to the respondent because they were beginning to deteriorate in the field. Mr. Anderson told Mr. Willoughby that the Baldwin County potatoes had to be cleared out first, and that his potatoes would be next. Because the FL-162 variety of potato was protected by Frito-Lay, and could be delivered only to Frito-Lay unless respondent released them for delivery to someone else, complainant was in no position to dig the potatoes, or to sell them to anyone else.

13. During the week of July 5, 1983, respondent gave complainant six purchase orders. However, during this week it declined to deal with complainant to any further extent because it was clearing out the Baldwin County potatoes. Mr. Willingham had returned from vacation, and he promised Mr. Willoughby that once the Baldwin County potatoes were cleared out the complainant would be next to receive purchase orders. However, this did not occur. Mr. Willoughby discovered on or about July 11, 1983, that Mr. Willingham and Mr. Anderson went to Sand Mountain, Alabama, which is in the Northerly portion of the state, and began to place purchase orders there for delivery of potatoes to respondent. Effectively, complainant had been by-passed. Complainant knew that his potatoes were beginning to melt in the ground, and otherwise deteriorate. Whereas at one point he could have harvested as much as 250 hundredweight of potatoes per acre, his yield began to drop radically in the second week of July. Complainant demanded that his potatoes be harvested. During June and July 1983 he would have been able to load six trucks a day, with each load containing 450 or more hundredweight of potatoes. When he discovered that the Sand Mountain potatoes were being harvested before his he grew angry. He took what action he could to harvest and

sell his potatoes. He sold some of the potatoes to other purchasers even though Frito-Lay had not released them for such sale.

14. Complainant delivered 18 loads of potatoes to respondent in June and July 1983, which comprised 8,588.64 hundredweight. 1,907.04 hundredweight of the potatoes delivered to respondent were rejected because they were not of satisfactory chipping quality, or otherwise did not meet respondent's needs. Complainant received net $35,508.97 for the 6,681.60 hundredweight of potatoes which were accepted, after deduction by respondent of $2,585.80 for its costs attendant on three of the four loads of potatoes which it rejected. Complainant also sold 3,329.93 hundredweight of potatoes to other purchasers in an effort to mitigate his damages. He received $14,580.00 for these potatoes. On July 18, 1983, respondent told complainant that his potatoes did not meet respondent's needs, and that complainant was free to dispose of them as he pleased.

15. With respect to the potatoes which complainant sold to respondent, respondent paid complainant $5.75 per hundredweight rather than the $5.50 per hundredweight called for in the contract signed on January 24, 1983.

16. The formal complaint in this matter was filed on March 6, 1984, which was within nine months from the time the cause of action herein accrued.

DISCUSSION

The most serious legal question presented by this case is whether a written contract between the parties may be varied by conduct on the part of the parties, or whether it must be strictly construed in such a manner that none of its provisions may be altered. There is a secondary question as to whether there was a separate contract entered between the parties under which respondent agreed to purchase and accept all of the potatoes grown by the complainant. Based upon the facts in this case, and our analysis of the applicable law, we conclude that the contract need not be strictly construed, but can be varied by the conduct of the parties. Therefore, we do not need to reach the secondary question.[1]

On January 24, 1983, complainant and respondent entered a contract under which complainant was to grow, sell, and deliver to respondent 25,000 hundredweight of chipping potatoes, which deliv-

[1] If we were to consider this issue we would find that there was not a new contract because all of the essential elements of such contract must be clear, and they were not. *Peters & Garabedian* v. *Coyner-Evans Co., Inc., et al.*, 28 Agric. Dec. 752 (1969). There is lacking in any verbal agreement between the parties after June 30, 1983, certain required terms such as the price of the potatoes, the time for delivery, and the place for delivery.

ery was to be over a three week period, with 8,000 hundredweight delivered during the week of June 13, 1983, 8,000 hundredweight delivered during the week of June 20, 1983, and 9,000 hundredweight delivered during the week of June 27, 1983. The contract also provided that the potatoes were to be U.S. Commercial 90 percent U.S. No. 1, size "A", chipping potatoes. They were to be delivered free on board the Willoughby farm in bulk. They were to be shipped to "Any receiving location designated by Area Potato Buyer." Furthermore it was provided that "All potatoes shipped under this contract guaranteed to chip to Frito-Lay's satisfaction upon arrival. Frito-Lay reserves the option of not accepting the deliveries which do not meet the above shipping schedules." Finally, it was provided that "Seller's obligations hereunder shall not be mitigated or reduced in any way by virtue of seller's having obtained or purchased seed potatoes from purchaser to produce the potatoes to be shipped hereunder." The contract was signed by Barton Willoughby on behalf of complainant and by Arthur Goldstein on behalf of respondent. Arthur Goldstein was located in Dallas, Texas.

As a direct result of entering the above contract for growing and selling potatoes, complainant entered four individual contracts for the purchase of seed potatoes from respondent. It did this because respondent had developed a brand of potatoes known as FL-162 which is a good chipping potato. The contracts provided, inter alia, that "the potatoes produced from the above seed cannot be sold or disposed of without the expressed permission (documented) by Frito-Lay, Inc." They further reflected that "Confirmation contingent upon grower having a 1983 Frito-Lay chip contract. . . ." The testimony reflects, and it is obvious by virtue of the above quoted provisions, that complainant would not have bought the seed potatoes unless their purchase was directly connected with the growth and sale of the 25,000 hundredweight of potatoes in the contract entered on January 24, 1983. It is also clear that both the January 24, 1983, contract to grow and sell potatoes and the purchase agreements with respect to the seed potatoes are contracts that are very favorable to Frito-Lay. Effectively, the seed potato contracts preclude the sale of potatoes grown therefrom to entities other than respondent, except with respondent's permission. The purchase and sale contract voids any obligation on the part of Frito-Lay which might arise as a result of the use of FL-162 seed potatoes by complainant. Furthermore, it gives respondent the option in its sole discretion to refuse to accept any potatoes which do not chip to its satisfaction. It allows Frito-Lay to reject the delivery of those potatoes which do not meet the shipping schedules set forth in the writ-

ten contract. The seed potato contracts permit respondent to decline to deliver seed potatoes if complainant has not entered a growing contract with Frito-Lay. In short, the seed contracts and growing contract, when read together, tied complainant in knots. Furthermore, because of the cross references contained in the growing contract and seed contracts, we find that the contracts are interrelated, and were entered by both parties in contemplation of an exclusive means by which respondent could assure itself of a supply of chipping potatoes. We reject any claim by respondent that the seed potato contracts are not related to the growing contract.

A contract is not a one sided agreement. Rather, it is an agreement between two (or more) parties under which each party agrees to assume certain responsibilities in return for consideration from the other party. Just as complainant had a duty to deliver potatoes to respondent, respondent had a duty to take them. Frito-Lay would place an added burden on complainant that he demand respondent accept delivery or subject himself to a finding he breached the contract rather than place an equal duty on itself to request delivery. Such a result would mean Frito-Lay could not breach the contract unless such demand was made. We cannot subscribe to such a result since it would be one-sided and further enhance respondent's already very favorable position, and in any event is illogical.

Complainant testified that he could have delivered 8,000 hundredweight of potatoes during the week of June 13, 1983, had it been necessary for him to do so, but that it was in his self interest not to because only about 75 percent of the potatoes lying in the field were size "A", as a result of which he would have had to dig too many acres to be able to deliver all 25,000 hundredweight as provided for in the contract, having only planted about 103 acres of potatoes, and having expected a yield of about 250 hundredweight of potatoes per acre. Therefore, he acknowledged that he agreed to withhold delivery of potatoes during the week of June 13, 1983. Complainant also acknowledged that during the week of June 20, 1983, he agreed to withhold delivery of 8,000 hundredweight of potatoes because, while he could have delivered them, his field could still size a little more. The willingness of complainant in both of these weeks to withhold delivery of potatoes to respondent was based upon conversations with respondent's representative. We find complainant's version of what happened to be totally credible. Mr. Willoughby was a most forthright, earnest, and honest witness. He would not have agreed to delay delivery of the potatoes on the dates specified by the contract unless he had received assurances

from respondent's agent that Frito-Lay was going to take the potatoes he had in the field. Mr. Willoughby is an experienced farmer with about 2,000 acres of farmland in production. He knows that crops in the field are perishable, and must be harvested in a timely fashion. He was bound by the seed contract not to sell the potatoes he grew to any party other than Frito-Lay.[2] Frito-Lay was obviously willing to delay receiving potatoes from complainant. We find that Mr. Willoughby's version of his conversations with Mr. Willingham is accurate. Among other things it reflects that respondent continually expressed a need to clear out potatoes from Baldwin County before dealing with complainant. Therefore, it is only logical to conclude that Mr. Willoughby acted upon the representations, as he suggested, of respondent's agent that Frito-Lay wanted to delay taking his potatoes.

Frito-Lay has claimed in this proceeding that Mr. Willoughby somehow acted improperly because he did not demand to deliver his potatoes to respondent on the contract dates. Respondent would put all burdens on complainant to assure that delivery occurred. We cannot draw a conclusion that this is a proper interpretation of the contract. As discussed above Frito-Lay has an equal responsibility to demand that complainant deliver potatoes in accordance with the contract terms. Indeed, had complainant not been able to deliver, Frito-Lay could have claimed damages. Therefore, we conclude the parties verbally agreed to a modification of the contract in both the weeks of June 13, 1983 and June 20, 1983, under which complainant, and respondent agreed to delay delivery of potatoes to a later date. The remaining question for resolution with respect to the 16,000 hundredweight of potatoes involved in the weeks of June 13, 1983, and June 20, 1983, is whether respondent's agent had authority to modify the contract, or whether the contract could not be modified because of the statute of frauds. This will be discussed subsequently.

The occurrences during the week of June 27, 1983, are even easier to resolve. By this time complainant's field effectively had sized to the maximum that it could. Mr. Willingham was on vacation during the week commencing on Monday, June 27, 1983. Therefore, Mr. Willoughby had to deal with Mr. Michael Anderson, Mr. Willingham's subordinate. The testimony shows conclusively that Mr. Willoughby was able to deliver the potatoes during the week of June 27, 1983, but that he knew they could probably size a

[2] Mr. Willoughby's integrity is manifested by the fact he did not sell potatoes to any other party until he had to on July 14, 1983, because they were deteriorating in the field. Such action was appropriate [illegible] late damages.

little bit more. It is clear based upon the testimony in this case that it was more at the behest of Frito-Lay that on June 27, 1983, Mr. Willoughby acceded to Frito-Lay's desire to delay delivery of the potatoes. In effect, it was the respondent which did not meet the contract terms insofar as delivery dates are concerned. Mr. Michael Anderson testified that Mr. Willoughby indicated he was not yet ready to harvest the potatoes. We do not find Mr. Anderson's testimony in this regard to be credible.[3] Mr. Anderson, either constructively or actually, convinced complainant that it was all right to wait for a while longer before his potatoes were delivered to respondent. He reiterated what Mr. Willingham had said about the need to clear out the Baldwin County potatoes before taking Mr. Willoughby's crop. Our conclusion in this regard is supported, moreover, because in actuality purchase orders for Monday and Tuesday of a given week are issued on Thursday or Friday of the preceding week. There is no showing that Mr. Willoughby knew this. Mr. Willingham and Mr. Anderson did. In fact on June 27, Frito-Lay had no purchase orders to give for the early part of the week, at least.

Two days later, however, Mr. Willoughby decided that he could not wait any longer because his potatoes were fully mature, and there was a danger they would begin to deteriorate if left in the field. Therefore, on June 29, 1983, he contacted Mr. Anderson and requested that he be allowed to dig his crop. Mr. Anderson attempted to put him off, saying that he did not know if he could get purchase orders. Obviously, Frito-Lay was in the position of denying to Mr. Willoughby the opportunity to harvest his crop by not providing purchase orders. Mr. Anderson eventually offered to provide several purchase orders to Mr. Willoughby for the week of June 27, beginning with June 30. Mr. Anderson, however, was only able to deliver one purchase order, and withdrew his promise to deliver more than that. He then convinced Mr. Willoughby that that one purchase order would be for a load of potatoes which would be used as the test load for the delivery of the rest of Mr. Willoughby's potatoes. Mr. Willoughby, lacking the ability to do other-

[3] We do not find Mr. Anderson's testimony, in general, to be particularly credible. There was a tendency throughout his testimony on the witness stand for Mr. Anderson to remember those points which were favorable to respondent, but to have a memory lapse when his testimony might be favorable to complainant. In addition, his testimony with respect to the July 5, 1983, visit that he made to Mr. Willoughby's farm is in direct contravention of what was happening during that period of time. To say that he was merely making a courtesy visit when Mr. Willoughby was demanding that he be given an opportunity to dig his potatoes is not credible testimony.

wise, acceded to Mr. Anderson's representations in this regard. He delivered a load of potatoes which apparently were of very good chipping quality. Complainant was not provided purchase orders so as to be able to dig any more potatoes until after the end of June, 1983.

On Tuesday, July 5, 1983, while Mr. Willoughby was working in the field, Mr. Anderson paid what he called a courtesy visit. We find that such visit was not a courtesy visit. Rather, it was visit predicated upon the fact that Mr. Willoughby was strongly asserting his need to dig his potatoes, and respondent, acting in a businesslike fashion, was checking out the situation with respect to Mr. Willoughby's crop. On July 5, 1983, Mr. Anderson told Mr. Willoughby again that the Baldwin County crop was late, was not in as good condition as were Mr. Willoughby's potatoes, and had to be harvested first. Mr. Willoughby said he was ready to dig then. Mr. Anderson at least implied that his crop would be next, that all Mr. Willoughby had to do was to be patient. Further, the clear implication of Mr. Anderson's visit is that respondent did not consider its contract with complainant to have ended. Rather, the visit is consistent with Mr. Willoughby's claim the contract had been modified to carry over into July. Otherwise, respondent would have released Mr. Willoughby to sell to other buyers. It is totally inconsistent for respondent to claim the contract had ended, but not to have released Mr. Willoughby to sell the potatoes elsewhere.

As a result of Mr. Anderson's visit however, respondent did give Mr. Willoughby a series of purchase orders. Respondent gave complainant 12 purchase orders beginning with July 5, 1983, and ending on July 13, 1983, in which potatoes were delivered by complainant to respondent. All those potatoes were accepted. There was one purchase order on July 5, one on July 6, two purchase orders on July 7, one on July 8, one on July 11, three on July 12, and three on July 13, 1983. During this period of time Mr. Willoughby was insisting that he needed more purchase orders. He made it clear that he could dig six loads of chipping potatoes a day, each load approximating 450 hundredweight. In the meantime, because Frito-Lay was not giving him more purchase orders, and recognizing what was happening to his potatoes in the field, Mr. Willoughby began to look for other purchasers, despite the fact that the seed potato contracts would not allow him to sell such potatoes to others unless he were released from their prohibitory provisions. On July 14, 1983, he sold a load to a company known as Mid-State. On July 16, 1983, complainant got four more purchase orders, and four loads were delivered to Frito-Lay. Three of those loads were rejected because they could not meet Frito-Lay's requirements. On

July 18, 1983, Frito-Lay took one last load from complainant, which load was rejected by respondent. On that same day Frito-Lay finally allowed Mr. Willoughby to sell his potatoes to other buyers. The load shipped to Frito-Lay on July 18 was resold to a third party. Complainant sought to mitigate his damages by the sale of eight more loads between July 18 and July 21, 1983. Two of these loads were rejected by the purchaser. After that period of time the crop was allowed to rot in the field because the potatoes had deteriorated too much to warrant harvesting.

Frito-Lay did not immediately begin to take complainant's potatoes after it finished digging in Baldwin County. Rather, Mr. Willoughby determined on or about July 11, 1983, that Mr. Willingham and Mr. Anderson had by-passed him and gone to Sand Mountain, Alabama, in the Northern part of the state. At that point he was fully aware that his potatoes were beginning to deteriorate, and that his yield per acre was going down rapidly. Respondent did not keep the promises made by its agents that it would take complainant's potatoes after the Baldwin County crop was cleared out.

Complainant did everything he could to mitigate his damages. Complainant acted responsibly during the entire contract period in his dealing with respondent. His actions in not delivering potatoes during the weeks of June 20, 1983 and June 27, 1983 were taken in reliance on representations made by the agents of respondent. He relied to his detriment on their representations that respondent wanted all of his crop, and that he would be next to receive purchase orders after the Baldwin County potatoes were harvested.

In view of the above the first question which must be resolved is whether Mr. Willingham and Mr. Anderson had actual or apparent authority to bind respondent. Frito-Lay claims it had given them no authority, actual or apparent, to bind it. While we believe that they had actual authority to do so, we need not reach that issue because we find, based upon the facts of this case, that they had apparent authority to do so, which is all that is required. Case law is abundant that when the agent of a principal has apparent authority to act on behalf of that principal, the other party to a contract has a right to rely upon such apparent authority in making his business decisions. *George Arakelian Farms, Inc.* v. *Leonard O'Day Company, et al.*, 31 Agric. Dec. 1395 (1972), and cases cited therein. We have previously held that when a business permits a field representative, who is the only person with whom the other party to the contract can deal, to appear as its agent, and such person makes representations, such representative has apparent authority, and his principal is bound by his actions. *A Levy and J.*

Zentner Co. v. *American National Growers,* 19 Agric. Dec. 1022 (1960); *Goldston* v. *Murlas Bros.,* 21 Agric. Dec. 542 (1962).[4] This is especially necessary when we are dealing with a perishable product because otherwise the other party to the contract cannot hope to recover his losses when promises are not kept. He does not have a product which can be sold to some third party at a later time.

We are drawn to the conclusion that Mr. Willingham and Mr. Anderson had at least apparent authority to bind Frito-Lay because of the way in which respondent operated. While the growing contract between Frito-Lay and Mr. Willoughby was signed by a Frito-Lay representative located in Dallas, all subsequent contacts between complainant and respondent were between Mr. Willoughby and either Mr. Willingham or Mr. Anderson. It is clear that respondent expected complainant to deal with those individuals. For respondent to argue that complainant could have got in touch with somebody in Dallas constitutes a denial of the way in which it was conducting its business operation. Frito-Lay further maintained control of its potato purchasing operation by providing purchase orders for four plants in the Southeast region of the United States out of its Dallas, Texas office. Mr. Willingham, and at times Mr. Anderson, had to get such purchase orders from Dallas, and give them to farmers who were under contract to sell potatoes to respondent. They clearly had input into who received the purchase orders, both by their own admission, and because out of necessity they were the only individuals with whom the farmers were dealing directly. The farmer was kept in the dark as to what was going on. Indeed, Mr. Anderson, in one of his more forthright statements, acknowledged that it was a practice of Frito-Lay not to tell the farmer any more then it had to. A farmer could not deliver potatoes to Frito-Lay unless he got a purchase order. That put the farmer into a subservient position in which he had to try to please the representatives of Frito-Lay in order to get what he was entitled to as of a date certain by virtue of the provisions of the contract. It is no wonder that Mr. Willoughby was willing to put off the harvest of his potatoes. Frito-Lay had him in a bind. For this reason, unless, as discussed below, the statute of frauds precludes changes in the contract dates by either Mr. Willingham or Mr. Anderson, we must find Frito-Lay breached its contract.

[4] We also find for complainant on the basis of estoppel. *Tri-State Sales Agency* v. *Palmetto Fruit & Produce Co.,* 14 Agric. Dec. 1140 (1955). Respondent held Messrs. Willingham and Anderson out as its agent, complainant relied on their representations, and was injured as a result of such good faith reliance.

Respondent's principal defense in this proceeding is that because there was a written contract entered on January 24, 1983, with respect to the terms and conditions surrounding the delivery of the potatoes, including the specification of exact weeks in which exact amounts of potatoes were to be delivered, those provisions cannot be varied by subsequent oral modifications agreed to between the parties.[5] Section 7-2-201(1) of the Alabama Commercial Code states:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract of sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Because the statute of frauds provision of Alabama states that it is not enforceable unless there is a writing when the contract is for more than $500, the holdings in *Rothenberg* v. *H. Rothstein & Sons,* 183 F.2d. 524 (3rd Cir. 1950), must be considered. The Third Circuit found with respect to transactions subject to the Perishable Agricultural Commodities Act that state law was not necessarily controlling with respect to a contract subject to the statute of frauds. It found that if a state statute of frauds rendered an oral contract void because it was not in writing, then the Secretary of Agriculture could not look further to determine whether there had been a breach of contract. If, however, the state statute of frauds, as is the

[5] Respondent raised numerous other defenses. They were essentially procedural in nature. It maintained, among other things, that complainant was inconsistent in his pleadings and testimony insofar as his theory of the case is concerned. We are not impressed by respondent's defense in this respect. While complainant did broach at least two different theories as to why the contract had been breached, i.e. that the contract time for delivery was extended by mutual agreement and that there were new contracts after July 1, 1983, between the parties, we do not believe that they are inconsistent with each other. Neither do we believe that respondent was put in any kind of difficult position by virtue of the fact that complainant amended its complaint during the hearing to reflect its belief that the contract provision had been amended to provide for delivery after July 1, 1983. This is particularly so because respondent was given and took advantage of the opportunity to have the hearing reopened to take further evidence. We would also note parenthetically that the fact that complainant's arguments on brief were not precisely attuned to his earlier theory of the case hardly lessens the credibility of Mr. Willoughby's testimony. The credibility of Mr. Willoughby's testimony is determined by the Presiding Officer based upon his observation of the witness, and the consistency with which Mr. Willoughby provided answers to questions, many of which were asked more than once. Mr. Willoughby at all times was a credible witness.

case for Alabama, is merely unenforceable if it is not in writing, it is only procedural and the Secretary of Agriculture can consider whether the oral contract was breached because pursuant to section 5 of the PACA (7 U.S.C. 499e) a party may sue either under state law or under the PACA.[6] Section 5 states in pertinent part as follows:

> (b) "Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter remedies now existing at common law or by statute, and the provisions this Act are in addition to such remedies."

Rothenberg, then, permits the Secretary of Agriculture to look at the facts standing behind an oral modification to a written contract to determine whether there has been a breach. This is extremely important in the perishable agricultural commodities industry because produce is perishable in nature, and if it is not rapidly disposed of, becomes worthless. The rule set forth in *Rothenberg* makes sense in terms of the industry which is to be regulated by the PACA. This industry is unique because the commodities are so perishable, frequently making it impossible for the seller to dispose of the commodity if it is rejected by a buyer who makes an oral promise to accept it.[7] Such is the case here. It is clear on the facts

[6] Complainant expressed some ambivalence as to whether the Texas or Alabama statute of frauds was applicable. Respondent dealt only with the Alabama statute. We find that the essential terms of the contract were entered in Alabama, and that the law of Alabama controls. In any event the statute of frauds of Texas renders contracts for the sale of goods of more than $500 unenforceable rather than void. See *Hegel Branch* v. *Mission Shippers*, 35 Agric. Dec. 726 (1976).

[7] Indeed, most contracts under the PACA are both for more than $500.00, and entered by oral communication which is subsequently memorialized by an invoice issued by the seller, but not assented to by the buyer except through acquiescence. The industry could be devastated if for each such contract the statute of frauds could be invoked to defeat enforceability.

Although there are factual distinctions, the principle set forth in *Hegel Branch* v. *Mission Shippers, Inc.*, supra note 6, at pages 731–32 is apposite here. The Judicial Officer stated:

> In matters involving the statute of frauds under the Perishable Agricultural Commodities Act, the Department has long followed the guidelines laid down in *Joseph Rothenberg* v. *A. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950), 9 A.D. 1272. In that case the court made it clear that a federal district court hearing a case on appeal from the Secretary under the Act does not sit as another court of the state and is not governed by the rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Such a case is rather "to be determined under the same rules of sub-

Continued

in this case that respondent's agents, Willingham and Anderson, in discussions with complainant, agreed to a modification of the contract. Such modification included all pertinent contractual terms. While there was no discussion as to price, it was clear that the price was to be the same as that provided for in the written contract simply because the agents were talking only about an extension of time in which to have the goods delivered to respondent.[8] Further, we are not aware of any holding which precludes an integrated written contract subject to the statute of frauds from being modified by subsequent oral agreement. Indeed, the Restatement of Contracts appears to point in the other direction.[9] What has not

stantive and procedural law as were involved in the Secretary's proceedings." (*Rothenberg,* supra). By the same token, *Rothenberg* also makes it clear that where the Act or regulations of the Secretary do not provide a solution to a problem of the validity of a contract, then state law is applicable. In the *Rothenberg* case the Court of Appeals, recognizing that since the statute of frauds of Pennsylvania was procedural rather thansubstantive it would not be applicable in a reparation proceeding. The court reasoned that "the federal act intends to grant a new remedy which is not dependent upon but is in addition to such other remedies as may be available to the parties at common law or by the statutes of any state", and that *where the statute of frauds of a particular state only precluded enforcement of an oral contract as a remedy, but left it otherwise valid, though unenforceable, such a procedural statute would have no effect upon a proceeding before the Secretary of a subsequent appeal therefrom.*

We feel that the substantive-procedural distinction as drawn in *Rothenberg* is valid and should remain applicable in reparation proceedings before the Secretary. There has always been a *reluctance to apply the statute of frauds in reparation decisions, due to the simple fact that oral contracts are extremely common in the fruit and vegetable industry.* Sales are commonly made interstate by phone, and where a broker is involved and issues a written confirmation, it is frequently not clear whose agent he was in the transaction. These factors combine to create situations where the application of the statute would work a fraud rather than prevent one. While the Secretary could by regulation provide that state statutes of frauds would not be applicable in reparation proceedings, he has not in fact done so. However, in the absence of such regulations we feel warranted in holding that in future cases the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable should be upon the party claiming the benefit of the statute. (emphasis added).

[8] It is basic contract law that any modification to a contract must be assented to by both parties. Further it is basic contract law that all of the essential terms of a contract must be set forth in the modification. We find that both of these requirements have been met in this instance.

[9] See Restatement Of The Law Second, Contracts 2d, ALI, 1981; section 216 of which states:

Continued

been determined is whether respondent's agreement to the modification of the contract was of such a nature that it must be held liable for the value of the entire 25,000 hundredweight of potatoes, less those which it received, accepted and paid for, and those which were sold by complainant to other purchasers in mitigation of damages.

The evidence shows clearly that each truckload of potatoes could comprise approximately 450 hundredweight. The evidence further shows that complainant could dig six truckloads worth of potatoes a day. Thus, from June 27 through July 1, 1983, complainant could have dug and delivered 30 truckloads of potatoes. This amounts to 13,500 hundredweight of potatoes.[10] In addition, it is clear that between July 5, 1983, and July 13, 1983, all of complainant's potatoes which wer e delivered to respondent were received and accepted as meeting respondent's requirements. Assuming that no potatoes would have been dug over the Fourth of July weekend, there would have been as many as 54 truckloads of potatoes dug during the nine day period between July 5 and July 13. That would amount to 24,300 hundredweight of potatoes. When added to the previous 13,500 hundredweight we arrived at a figure of 37,800 hundredweight of potatoes which could have been dug by complainant by July 13, 1983. That is more than the contract called for. Given the high quality of the load dug on June 30, 1983, as acknowledged by Mr. Anderson, We must assume that all of complainant's potatoes would have been acceptable to respondent had they been delivered by July 13, 1983. That they were not is the fault of respondent, who did not provide complainant with enough purchase orders to be able to do so. As mentioned before complainant relied upon the

"(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not complete integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumtances might naturally be omitted from the writing."

We find that the agreement herein was not completely integrated because it would be natural to omit an understanding that the actual dates for delivery of complainant's crop might vary in accordance with maturity and the needs of Frito-Lay for the potatoes. The agreement entered was a standard agreement for the purchase and sale of a crop.

[10] We are not impressed by the testimony by Mr. Anderson that complainant's equipment was consistently breaking down. Complainant explained that equipment on a farm always breaks down. He further stated that he keeps several thousand dollars worth of parts available to repair the equipment.

promises made by respondent's agents, who had at least apparent authority to make them, that his potatoes would be purchased, received, and accepted if they met the quality requirements of respondent. Therefore, complainant has met his burden of proof that all 25,000 hundredweight of potatoes were of the quality required by Frito-Lay. That leaves for resolution only the amount of damages which must be awarded.

The total contract price agreed upon between the parties for the 25,000 hundredweight of potatoes, at $5.50 per hundredweight, was $137,500.00. Respondent purchased, received and accepted 6,681.60 hundredweight of potatoes, and paid complainant $35,508.97, at the rate of $5.75 per hundredweight for those potatoes, less certain deductions pertaining to three loads which were reject. Complainant mitigated his damages by selling 3,329.93 hundredweight of potatoes to other purchasers in eight transactions, for total receipts of $14.580.00. Therefore, complainant suffered damages in the total amount of $87,411.03. Respondent's overpayment for the potatoes which it did receive at the rate of $.25 per hundredweight has been taken into account in the above computation. Since complainant only requested damages of $84,825.83 in its complaint, and damages were in an amount greater than that requested in the complaint complainant's award shall be limited to the amount originally requested. Respondent's failure to pay complainant $84,825.83 is a violation of section 2 of the Act for which reparation should be awarded with interest.

As the prevailing party complainant is entitled to reasonable attorney's fees and other expenses. Complainant claimed his attorney spent 16 hours preparing for the hearing at a rate of $100.00 per hour, and 15 hours at the hearing at a rate of $125.00 an hour, for a total charge of $3,475.00. Complainant's attorney also charged $100.00 per hour for 15 hours of time preparing for taking four depositions for a total charge of $1,500.00. In addition, complainant attorney spent 6½ hours taking the depositions at $125.00 an hour for a total charge of $812.50. Total attorney fees, therefore, were $5,787.50. In addition, there was $600.00 claimed for attorney travel to take the depositions. $1,550.00 was claimed for travel by witnesses, and subsistence, in order to appear at the hearing. Finally there was a claim of $535.89 for transcripts of the hearing and the depositions. The total claim for fees and expenses related to the hearing by complainant was $8,473.39. We find this sum to be reasonable, and an award in this amount should be made in favor of complainant, with interest thereon.

Respondent shall pay to complainant $84,825.83, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

Respondent shall pay to complainant for attorney's fees and other expenses $8,473.39, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

FRUIT MARKETING, INC., *v.* LOFCHIE INC., a/t/a BRUCE CO., PACA Docket No. 2-6857. Decided May 1, 1986.

Burden of proof as to breach and damages on respondent—breach of suitable shipping condition warranty—damages incurred by respondent deducted from contract price—reparation awarded.

Respondent sustained its burden of proving a breach of complainant's suitable shipping condition warranty regarding the truckload of peaches it accepted. Respondent incurred damages based on the difference between the contract price plus freight and the amount obtained upon resale. Respondent held liable for the contract price less its damages.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se.*
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,323.00 in connection with a truckload of peaches sold to respondent and shipped, in interstate commerce, to respondent's customer.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an op-

portunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answering statement, and complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Fruit Marketing Inc., is a corporation whose address is P.O. Box 399, Del Rey, California.

2. Respondent, Lofchie Inc., a/t/a Bruce Co., is a corporation whose address is 325 W. Shields, Suite 102, Fresno, California. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately September 7, 1984, complainant sold to respondent a truckload of peaches consisting of 660 cartons at $5.85 per carton, plus $.70 per carton for cooling and palletization, for a total contract price of $4,323.00, f.o.b. The peaches were to be shipped to respondent's customer, Finest Fruit Co., Inc., Bronx, New York.

4. On September 8, 1984, complainant loaded the truck with 660 cartons of peaches and prepared a bill of lading, showing the shipping date of September 8, 1984, the destination as New York City, and the temperature to be maintained enroute as 36° F.

5. The peaches arrived at the place of business of respondent's customer in Bronx, New York, on September 14, 1984. At 3:45 a.m. that same day they were subjected to a federal inspection, which found as follows, in relevant part:

> VARIOUS CONTAINERS Range 38° *To 39°F.*
>
> Peaches "Del Pak Summerset 48-50". . . *Applicant States:* . . . 660 cartons of peaches. . . .
>
> *Condition: Peaches:* Mostly firm ripe, some ripe. Yellow ground color. 4 to 18%, average 11% damage by bruising, scattered throughout pack, affecting all stages of ripeness. 6 to 20%, average 13% damage by external brown discoloration. No decay.

6. The Market News Service Reports for Bronx, New York on September 14, 1984, shows that the supply of such peaches were too few to enable the quoting of a market price.

7. Respondent resold the peaches to Finest Fruit Co., Inc., for a total of $4,747.50.

8. Respondent has paid complainant $1,810.00 for the load of peaches at issue.

9. A formal complaint was filed on March 21, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent admits receiving and accepting the peaches, but claims that a federal inspection taken upon arrival showed they contained an excessive amount of condition defects, in breach of complainant's suitable shipping condition warranty. Complainant claims that it was not notified until September 25, 1984, 11 days after the peaches arrived, that the peaches had been inspected and found to contain condition defects. Complainant also contends that respondent has failed to prove that the temperature during transit was proper. Complainant further disputes respondent's claimed damages derived from its resale of the peaches.

Having accepted the peaches, respondent became liable for the agreed upon contract price, less damages arising from any breach of warranty by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983). As this was an f.o.b. sale, complainant gave the implied warranty of suitable shipping condition, which is defined at 7 CFR 46.43(j) as meaning "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The September 14, 1984, federal inspection (Finding of Facts 5) revealed an average of 11% damage by bruising and 13% damage by external brown discoloration, for a total of 24% condition defects, which constituted abnormal deterioration. Complainant appears to be claiming that transportation conditions were abnormal, therefore voiding the suitable shipping condition warranty. While we agree with complainant that in an f.o.b. sale it is respondent's burden to prove that transportation conditions were normal (*Oneonta Trading Corporation* v. *Tommie's Cello-Pak, Inc.*, 40 Agric. Dec. 1798 (1981)), the evidence in the record shows that respondent has sustained this burden. The peaches were shipped from complainant in Del Rey, California on September 8, 1984, and arrived in Bronx, New York on September 14, 1984, six days later, which is a reasonable transit time for the distance covered. Further, the inspection report shows the temperature of the peaches as from 38° to 39°F., which is well within the normal range. The 11% damage by bruising was most likely caused by complainant loading some fruit that was softer than it should have been, as shown by

the inspection report's description of the peaches as "mostly firm ripe, some ripe." In view of the abnormal deterioration exhibited by the peaches when they arrived at respondent's place of business, and considering that transportation conditions were normal, we conclude that complainant breached its warranty of suitable shipping condition with respect to these peaches.

As damages from complainant's breach of warranty, respondent is entitled to the difference, at the time and place of acceptance, between the actual value of the peaches and their value if they had been as warranted. *Tom Bengard Ranch, Inc. a/t/a Kleen Harvest* v. *Garden State Farms, Inc.*, 42 Agric. Dec. 922 (1983). The actual value is determined by a prompt and proper resale. Respondent has provided evidence that it sold the 660 cartons of peaches to Finest Fruit Co., Inc., Bronx, New York, for $4,747.50. There is nothing in the record indicating that this resale was not prompt and proper. For the value of the peaches if they had been as warranted, respondent urges that reference be made to the Market News Service Reports at Bronx, New York. However, the Market News Service Reports contain no listings for California peaches on September 14, 1984, the date of acceptance. We will therefore use the contract price plus freight. The contract price for these peaches was $6.55 per carton, for a total f.o.b. contract price of $4,323.00. According to the account of sales of Finest Fruit Co., Inc., the freight was an additional $1.91 per carton or $1,260.60, for a total of $5,583.60. If we subtract the actual value of the peaches, $4,747.50, from their value if they had been as warranted, $5,583.60, we find respondent's damages to have been $836.10. Respondent has not claimed any incidental damages. Therefore, respondent's liability to complainant is the f.o.b. contract price of $4,323.00 less its damages of $836.10, resulting in $3,486.90. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,486.90, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

THOMAS B. SMITH d/b/a THOMAS B. SMITH FARMS, *v.* I. M. C. BROKERAGE & PRODUCE CO., INC. PACA Docket No. 2-6777. Decided May 5, 1986.

Acceptance by taking possession of, and reselling, produce—neutral inspection necessary to show condition of produce—open-ended allowance not proven—failure to submit accounting of resale precludes award of damages—accord and satisfaction by holding check not shown—reparation awarded.

In f.o.b. sale of tomatoes respondent accepted by taking possession and reselling. Testimonial evidence of poor condition on arrival was discounted, a neutral inspection being necessary to establish condition of perishable produce. Respondent alleged that it was granted an open-ended allowance, but failed to prove this allegation by a preponderance of the evidence. Respondent failed to submit an accounting, and therefore could not have established its loss even had the allowance been proven. Complainant's retention of respondent's check marked "paid in full" was not deemed an accord and satisfaction, because complainant failed an informal complaint shortly after receiving the check and requested that the Department secure the check's release as an undisputed amount.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
James A. White, Esquire, Fayetteville, GA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $7,844.82 in connection with the shipment in interstate commerce of a truckload of tomatoes. The formal complaint was later amended to request an award in the amount of $10,362.00 in connection with the same load.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering

statement, and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant is an individual, Thomas B. Smith, doing business as Thomas B. Smith Farms, whose address is Route 1, Box 129, Quincy, Florida.

2. Respondent, I. M. C. Brokerage & Produce Co., Inc., is a corporation whose address is 120 Lakeview Drive, Woolsey, Georgia. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about August 4, 1984, complainant sold to respondent, on an f.o.b. basis, one truckload of tomatoes having an invoice value, after deduction of an $800 credit on a previous load, of $10,362.00.

4. On or about August 4, 1984, complainant shipped the tomatoes from loading point in Quincy, Florida to respondent in Woolsey, Georgia by means of respondent's truck. Upon arrival at respondent's place of business in Woolsey, Georgia the tomatoes were accepted by respondent. Respondent tendered payment to complainant in the amount of $3,318.00, marking the check payment in full. Complainant returned this check to respondent.

5. The formal complaint was filed on January 28, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the full purchase price of a truckload of tomatoes sold to respondent. Although respondent contends that the tomatoes were not accepted, the record clearly shows that respondent took possession of the tomatoes and resold them. There is no credible evidence that respondent gave complainant any timely notice of rejection prior to unloading the tomatoes. See *Santa Clara Produce* v. *Caruso Produce Inc.*, 41 Agric. Dec. 2279 (1982). Since respondent accepted the tomatoes it became liable to complainant for the full contract price less any damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *J. Prettyman, Jr.* v. *D. J. LaMantia,* 41 Agric. Dec. 1614 (1982).

Respondent contends that the subject tomatoes arrived in poor condition. Respondent also contends that it deducted substantial amounts from complainant's invoice because of poor deliveries on two other shipments of tomatoes which are referred to by complainant in his formal complaint. Respondent sought to establish

by affidavit testimony that the tomatoes were in poor condition. We have held many times that testimonial evidence in regard to the condition of perishable produce must be discounted. An inspection by a neutral party conducted on the basis of scientific sampling and an accurate description of the percentage of grade defects, or condition defects, is necessary. See *Mutual Vegetable Sales, v. Select Distributors,* 38 Agric. Dec. 1359 (1979).

Respondent submitted an affidavit by one of its employees, J. Ron Howard, who stated that he was in charge of sales, purchasing, and receiving tomatoes. Mr. Howard stated that as to one of the two previous loads of tomatoes, that which was shipped on July 16, 1984, he had a conversation with a person identified only as "Bud" who he understood to be the person in charge of sales for complainant. Mr. Howard stated that Bud acknowledged that the July 16, load of tomatoes was of poor quality, and promised that "any loss as a result of the poor quality would be made up." Respondent asserts that the loss on the load was $2,028.00. Complainant submitted the affidavit of W. H. Fulford, Jr., who stated that on or about July 16, 1984, he spoke directly with Mr. I. M. Cartwright of respondent's firm about respondent's dissatisfaction with the July 16, 1984, load of tomatoes. Mr. Fulford states that, as the salesman involved, he was authorized by Mr. Smith to grant to Mr. Cartwright a 50 cents per box credit for the tomatoes which totalled $800. Mr. Fulford stated that this amount was deducted from the invoice for the tomatoes shipped on August 4, 1984. We find that respondent has failed to prove the open ended allowance which it has alleged. In addition we note that respondent failed to supply us with any accounting of the resale of the tomatoes shipped on July 16, 1984, and that consequently respondent would not have been able to recover the alleged loss of $2,028.00 in any event.

Mr. Howard also made essentially the same allegations in regard to tomatoes shipped on July 26, 1984. Mr. Fulford stated in his affidavit that he did not speak with Mr. Cartwright about any other complaints, and that there was a price adjustment on only one load, namely the load on July 16, 1984. Again, as to this load respondent did not submit an accounting of the resale of the tomatoes, and therefore we could not allow the alleged loss of $768.00 in regard to these tomatoes in any event.

In regard to the subject tomatoes shipped on August 4, 1984, Mr. Howard again alleged that he had conversations with "Bud" concerning the alleged poor quality of the tomatoes and resulting losses. Mr. Howard stated that "Bud" advised that the problem would be taken care of. This allegation is, of course, also answered

by the affidavit of Mr. Fulford, and again, we note that respondent did not submit an accounting of the resale of this last load of tomatoes. Accordingly respondent could not have recovered the alleged loss of $4,248.00 in any event.

In its answer respondent raised as a defense the allegation that there had been an accord and satisfaction in regard to the August 4, 1984, shipment of tomatoes as a result of the retention by complainant of an August 20, 1984, check in the amount of $3,318.00 which had typed thereon the notation "paid in full all tomatoes". The record discloses that respondent did not return the check to complainant until February 8, 1985, when it filed its amendment to the formal complaint. However, the record also shows that complainant filed with this Department an informal complaint on October 3, 1984, and clearly stated therein that he was not accepting respondent's check for $3,318.00 marked paid in full. Respondent was given notice of the informal complaint by a letter from this Department dated October 16, 1984, and such letter specifically requested that respondent release the check to complainant as an undisputed amount without prejudice to the rights of either party regarding the balance in dispute. The Department asked that respondent reply by October 30, 1984. Respondent did not reply to the Department's letter until November 30, 1984, and in its reply made no reference whatever to the check being held by complainant. We do not believe that the record in this proceeding supports respondent's contention that there was an accord and satisfaction as a result of retention of the check by complainant.

As we stated earlier respondent accepted the tomatoes, and thus became liable to complainant for the full purchase price of $10,362.00. Respondent has not proven any breach on the part of complainant, or any modification of the original contract which would allow payment of a lesser amount. Accordingly, respondent is liable to complainant for the full purchase price of $10,362.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $10,362.00, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid

Copies of this order shall be served upon the parties.

G.A.C. PRODUCE CO., INC., *v.* THE OTAY PACKING CO., PACA Docket No. 2-6872. Decided May 5, 1986.

Allegation of credit uncontradicted—undisputed—complaint dismissed.

Complainant failed to offer any rebuttal to respondent's allegation that a credit had been allowed on two shipments of tomatoes. It was concluded that the credit had been granted.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $53,166.00 in connection with several shipments of tomatoes in contemplation of movement in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability to complainant in the amount of $50,574.00, and denying liability to complainant for the balance claimed. An order requiring respondent to pay complainant the sum of $50,574.00 as an undisputed amount was issued on August 26, 1985, pursuant to section 7(a) of the Act (7 U.S.C. § 499g(a)) and section 47.8(b) of the Rules of Practice (7 CFR § 47.8(b)).

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between September 17, and September 22, 1984, complainant sold to respondent 8,664 containers of tomatoes, 6×6 size and larger, approximately 85% U.S. No. 1 grade or better, for the total price of $53,166.00 f.o.b. complainant's warehouse in Chula Vista, California.

4. Between September 17, and September 22, 1984, complainant shipped the tomatoes from its warehouse in Chula Vista, California to respondent in Chula Vista, California in contemplation of subsequent movement in interstate commerce. Respondent accepted the tomatoes upon arrival.

5. At some time after arrival of the tomatoes complainant granted respondent an allowance of $1.00 per carton on two shipments containing 1,296 cartons each, or a total allowance of $2,592.00.

6. The formal complaint was filed on March 5, 1985, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent admitted liability to complainant, in its answer, in the total amount of $50,574.00. On August 26, 1985, an order was issued requiring respondent to pay complainant the amount of $50,574.00 as an undisputed amount. In its answer respondent's vice president, Earl Tachiki, stated that complainant had agreed to give respondent a credit of $1.00 per carton on two shipments containing 1,296 cartons each. The total amount of the alleged credit was $2,592.00. Complainant had the opportunity to rebut the statement by respondent's president but failed to do so. There is no evidence in the record which contradicts the statement by respondent's president. Accordingly, we conclude that complainant granted respondent an allowance of $1.00 per carton on the two shipments, or a total allowance of $2,592.00. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

NAPLES TOMATO GROWERS, INC., *v.* PETER G. PAPPAS and PHILIP G. PAPPAS d/b/a PETE PAPPAS & SONS, PACA Docket No. 2-6879. Decided May 5, 1986.

F.o.b. sale—special price agreement—reparation awarded.

Parties agreed that tomatoes were to be sold f.o.b. with price to be determined by "next week's market." Respondent contended that price was to be determined as of the day following shipment. It was held that the price term used required use of an average price for the whole business week following shipment.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
George S. Charles, Washington, DC, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,800.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Naples Tomato Growers, Inc., is a corporation whose address is Route 2, P.O. Box 1700, Naples, Florida.

2. Respondent, is a partnership composed of Peter G. Pappas and Philip G. Pappas doing business as Pete Pappas & Sons, whose address is 1401 Okie Street, N.E., Washington, D. C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 20, 1985, complainant sold to respondent one truckload of mature green tomatoes consisting of 800 25 pound cartons of size 6×6, and 800 25 pound cartons of size 6×7, Beef Stake Brand, with the price to be established on the basis of "next week's market".

4. The tomatoes were federally inspected on January 20, 1985, at shipping point, and found to grade U.S. combination with at least 85% U.S. No. 1, and no decay.

5. Complainant shipped the tomatoes to respondent on January 20, 1985, and such tomatoes were accepted by respondent on arrival in Washington, D. C.

6. The average of the prices quoted for the Florida shipping point market during the week of January 21–25, 1985, was $15.33 for size 6×6, and $13.25 for size 6×7 tomatoes, 85% U.S. No. 1 or better. The average of the prices during the same period of time for the Washington, D. C. area (Jessup, Maryland) was $15.50 for size 6×6, and $13.50 for size 6×7 tomatoes of generally good merchantable quality and condition.

7. The formal complaint was filed on April 16, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks to recover for the tomatoes sold to respondent on the basis of $14.00 per carton for the size 6×6 tomatoes, and $12.00 per carton for the size 6×7 tomatoes. This would amount to a total price of $20,800.00 for the truckload of tomatoes, and complainant also maintains that it should be allowed $240.00 for palletizing, or a total of $21,040.00, f.o.b., Naples, Florida. Respondent has remitted to complainant $16,240.00 for the truckload of tomatoes, which amounts to $11.00 for the size 6×6 tomatoes, and $9.00 for the size 6×7 tomatoes, plus $240.00 for palletizing. Both parties seem to be agreed that the term "next week's market" referred to the week beginning January 21, 1985, rather than the literal next week which would begin on Sunday January 27, 1985. Respondent submitted Market News Reports for Jessup, Maryland which not only showed tomato prices for that market, but also showed shipping point prices for South & Central Florida. The reports submitted by respondent covered Monday, January 21, through Monday, February 4, 1985. As stated in the Findings of Fact, the average price for the size 6×6 tomatoes during the week of January 21, through 25, at shipping point, was $15.33 per carton, and for the 6×7 tomatoes, $13.25 per carton. However, this is an average of only 3 days, namely January 21, 24, and 25, since there were no price quotations for January 22, and January 23. The prices shown

at shipping point for January 21, for size 6×6 were $9.00 to 10.00, mostly $10.00, and for size 6×7 $7.50 to $8.00. The prices for January 24, and January 25, were $18.00 for the size 6×6, and $16.00 for the size 6×7. A corresponding rise in price was also shown for the Jessup, Maryland market, but such market additionally showed quotations for January 22, and 23. These prices were generally sustained for Monday, January 28, and began falling on January 29, 1985.

Respondent maintains that the price which it should pay to complainant should be based on the market price for January 21, 1985. However, although the record does not disclose when the tomatoes arrived, it is unlikely that respondent could have begun selling the tomatoes any earlier than January 22, 1985, at the earliest. We believe that the terms of sale used by the parties contemplated that the price would be set on the basis of the average price for the week of January 21, 1985. Such average price, both at shipping point and at Jessup, Maryland, was in excess of the price being asked in this proceeding by complainant. We conclude that the terms of sale require that respondent pay complainant at least such price, or the requested $14.00 per carton for the size 6×6, and $12.00 per carton for the size 6×7, plus $240.00 for palletizing, or a total for the truckload of $21,040.00. Respondent has already paid complainant $16,240.00 of this amount, which leaves a balance still due of $4,800.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,800.00, with interest thereon at the rate of 13 percent per annum from February 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., *v.* METRO PRODUCE INC., PACA Docket No. 2-6883. Decided May 5, 1986.

Contract price protected on arrival—with acceptance, buyer must pay contract price less damages proven—reparation awarded.

Buyer/respondent accepted potatoes but claimed agreement was that price was to be protected through sale. Complainant asserted contract term was that price was protected only until arrival. Conflicting affidavits could not be resolved but evidence showed market did not drop between shipment and arrival and that respondent's

real concern was with the quality of potatoes. Respondent offered no evidence as to breach and damages as to quality nor no evidence to show it promptly and properly resold potatoes and the price it received. Therefore, respondent was liable for contract price less amount already permitted.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,275.00 in connection with the sale of potatoes in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

In its answer, respondent denied liability claiming that the contract price was not to be determined until after sale, and asserting that it had paid complainant the amount respondent received after sale.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Both parties filed opening statements. Both parties declined an opportunity to file briefs.

FINDINGS OF FACT

1. Complainant Nick Delis Company, Inc., hereinafter referred to as the complainant, is a corporation whose mailing address is P.O. Box 1089, Millbrae, California 94030.

2. Respondent Metro Produce, Inc., hereinafter referred to as respondent, is a corporation whose mailing address is 12374 Helen, Southgate, Michigan 48195.

3. Both parties are, and at all times material herein were, licensed with the Secretary of Agriculture to do business under the Act.

4. On April 26, 1984, complainant sold to respondent 910 cartons of U.S. No. 1 White Rose potatoes at an invoice price of $6.00 per carton plus a temperature recorder at $22.50 for a total F.O.B. in-

voice price of $5,482.50. The goods were shipped in interstate commerce and received and accepted by respondent on May 2, 1984.

5. Respondent has remitted a total of $3,207.50 in payment for these potatoes.

6. The formal complaint was filed on March 4, 1985. An informal complaint was filed on November 2, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over the price term in the contract. Respondent claims that its agreement was that it was to be protected as to price through sale, that is that price was to be determined after sale. Complainant asserts, however, that the agreement was to protect respondent as to price only until arrival of the commodity. The invoice in question contains a notation "price protected on arrival." Respondent claims, however, that this was error and that it corrected the original of the invoice and returned it to complainant. Complainant, however, filed the affidavit of Paul Brown, its salesman at the time, in which he states that he agreed only to a protection of the price until arrival and specifically denies that he agreed to give protection of the entire load or to any other price adjustment. Significantly, respondent has not submitted the corrected invoice.

We are faced with two sworn statements asserting diametrically opposite stories. Whether there was a misunderstanding, or one party's statement is erroneous cannot be determined. An examination of the entire record, however, reveals several factors helpful to the resolution of this matter. First, there is no contention that the price of potatoes dropped while they were in transit. The $6.00 per carton, therefore, seems to be consistent with the prevailing market price. Second, respondent's real complaint seems to be that the potatoes were of only "fair" size and quality. However, respondent has offered neither a U.S.D.A. inspection nor any other evidence to demonstrate that the potatoes were of lesser quality than warranted. Finally, respondent has not submitted accountings showing what it received upon resale of the potatoes.

Having accepted the potatoes, respondent is liable for the contract price less any damages sustained. See *Theron Hooker Company* v. *Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971); *Rydell California Potato Co.* v. *The Kaufman-Brown Potato Company*, 16 Agric. Dec. 1055 (1957). As noted above, the evidence indicates that the market price was $6.00 per carton at the time the potatoes were accepted. Respondent is liable to pay this amount unless it can ---ve damages. Respondent, however, has submitted no evidence to

support a contention that the potatoes were worth less than $6.00 per carton. A mere statement as to amount of money received upon the resale of the potatoes without the accountings and without evidence demonstrating prompt and proper resale is not sufficient to meet respondent's burden to prove damages.

Therefore, complainant is entitled to receive the value of the goods shipped plus the cost of the temperature recorder. It is entitled to receive $5,482.50, of which is has received $3,207.50, leaving a total of $2,275.00 still due and owing. Respondent's failure to pay that amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

ORDER

Within 30 days of the date of this decision, respondent Metro Produce, Inc., shall pay complainant Nick Delis Company, Inc., the amount of $2,275.00 as reparation, plus interest at 13 per cent per annum from June 1, 1984, until paid.

Copies of this Order shall be served upon the parties.

BELRIDGE PACKING CO., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7111. Decided May 5, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $29,534.50 in connection with two shipments of carrots in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Belridge Packing Co., is a corporation whose address is P. O. Box 1852, Bakersfield, California 93303. Respondent,

Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $29,534.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $29,534.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ROGER HARLOFF PACKING, INC., *v.* JOHN LIVACICH PRODUCE, INC., a/t/a VISTA SALES, PACA Docket No. 2-6829. Decided May 15, 1986.

F.o.b. sale and acceptance—authority of broker to negotiate protection agreement not established—protection agreement voided by failure to keep records of resales and losses—reparation awarded.

Respondent accepted two loads of tomatoes and alleged that protection was granted after acceptance. Evidence was insufficient to show whether protection was granted by complainant or by broker acting on his own. In either event, respondent did not furnish records of resales and losses. Consequently, any protection agreement would be voided.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $972.00 in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was

served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Roger Harloff Packing, Inc., is a corporation whose address is P.O. Box 1787, Bradenton, Florida.

2. Respondent, John Livacich Produce, Inc., is a corporation also trading as Vista Sales, whose address is 2231 Willow Brook Drive, Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about December 2, 1983, complainant sold to respondent 1,008 25 pound boxes of Palmetto Beauty U.S. No. 2 5 ×6 cartons of tomatoes at $3.00 per carton, and 504 2 5 pound cartons of Palmetto Beauty U.S. No. 2 6 ×6 cartons of tomatoes at $2.00 per carton, plus $226.80 for palletizing, and $22.50 for a temperature recorder. Complainant later granted respondent a reduction in price of $1.00 per carton on 360 cartons of the 5 ×6 tomatoes, reducing the total price for the truckload to $3,921.30.

4. The tomatoes covered by Finding of Fact 3 were federally inspected at Palmetto, Florida on November 26, 27, and 28, 1983, and found to grade U.S. No. 2 with no decay. Complainant shipped the tomatoes from loading point in Palmetto, Florida to respondent in Vista, California on December 2, 1983.

5. On December 2, 1983, complainant sold to respondent 1368 25 pound boxes of Palmetto Beauty U.S. No. 2 6 ×6 tomatoes at $3.00 per carton 72 25 pound boxes of Palmetto Beauty U.S. No. 2 6 ×7 tomatoes at $2.00 per carton, and 144 25 pound boxes of Palmetto Pride U.S. Combination grade tomatoes at $2.00 per carton, plus palletizing in the amount of $237.60; and a temperature recorder in the amount of $22.50, for a total f.o.b. price of $4,796.10.

6. The tomatoes covered by Finding of Fact 5 were federally inspected at Palmetto, Florida on November 28, and 29, 1983, and the 1368 cartons of 6 ×6 tomatoes and 72 cartons of 6 ×7 tomatoes were found to grade U.S. No. 2 with no decay. The 144 cartons of 6 ×7 tomatoes were found to grade U.S. Combination with no decay. Complainant shipped the tomatoes covered by Finding of Fact 5

from Palmetto, Florida to respondent in Vista, California on December 2, 1983.

7. Respondent received and accepted the two truckloads of tomatoes and has paid complainant only $7,745.40 leaving a balance still due and owing of $972.00.

8. An informal complaint was filed on March 5, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent took possession of the two truckloads of tomatoes on arrival at destination and is therefore deemed to have accepted such tomatoes. However, respondent maintains that a protection agreement was entered into in regard to both loads of tomatoes after their arrival. This allegation by respondent seems to be confirmed by a letter contained in the report of investigation from the broker who negotiated the sale of the two truckloads of tomatoes. Such letter indicates that protection was granted in regard to both loads due to "excessive color". However the wording of the broker's letter does not make it clear whether the protection was granted by complainant or by the broker acting on his own.

Whether or not complainant authorized the protection agreement alleged by respondent, we have held that it is incumbent upon a receiver who has such an agreement to keep records which substantiate its resales and losses. See *Dave Walsh Co.* v. *Liberty Fruit Co.*, 38 Agric. Dec. 533 (1979). Respondent did not supply any records which would adequately substantiate the resales, and losses resulting from such resales. As a consequence of such failure we must view any protection agreement as voided. See *Demarco Produce Co., Inc.* v. *J. R. Cortes & Co.*, 39 Agric. Dec. 1256 (1980).

Since respondent accepted the tomatoes it became liable to complainant for the full purchase price thereof, less any damages resulting from any breach of contract on the part of complainant. Although it was alleged that the tomatoes arrived with excessive color, respondent supplied us with no arrival inspections which would substantiate this claim. Accordingly we find that respondent has failed to show any breach on the part of complainant. Respondent is liable to complainant for the full purchase price of the tomatoes less the adjustment in price which complainant has admitted t granted, or a total of $8,717.40. Respondent has already paid omplainant $7,745.40 of this amount, which leaves a balance stillue and owing $972.00. Respondent's failure to pay complainant uch amount is a violation of section 2 of the Act for which reparaon should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $972.00, with interest thereon at the rate of 13% per annum from January 1, 1984, until paid.

Copies of this order shall be served upon the parties.

I. R. JEROME COMPANY, LTD., *v.* CORGAN & SON, INC., PACA Docket No. 2-6861. Decided May 15, 1986.

Contract terms contained in broker's confirmations of sale—breach of warranty not proven by respondent buyer—reparation awarded.

Where the parties disagreed about the contract terms, the most convincing evidence was the broker's confirmations of sale, to which neither party objected. Respondent buyer failed to sustain its burden of proving a breach of warranty by the complainant seller.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,234.80, in connection with the sale and consignment of two truckloads of melons to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, I. R. Jerome Company, Ltd., is a corporation whose address is P. O. Box 1030, Parker, Arizona.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On approximately July 9, 1984, complainant sold to respondent a truckload of melons consisting of 540 cartons of honeydews and 714 cartons of cantaloupes. The honeydews were composed of 180 cartons of number 4's at $3.00 per carton, 180 cartons of number 5's at $3.60 per carton, and 180 cartons of number 6's at $3.60 per carton, plus $.40 per carton for palletizing, or $2,052.00, f.o.b. The cantaloupes were composed of 336 cartons of 15's at $4.50 per carton, and 378 cartons of 18's at $5.00 per carton, plus $.80 per carton for palletization, or $3,973.20, f.o.b. The contract price also included a brokerage fee of $.20 per carton, or $250.80, and $22.50 for a temperature recorder, for a total of $6,298.50. Frank Minardo, Yuma, Arizona, acted as the broker, and issued a confirmation of sale setting forth the contract terms, which he sent to both parties. The confirmation clearly stated that complainant was the seller and respondent the buyer. Neither party objected to this confirmation.

4. The July 9, 1984, load was shipped in interstate commerce to respondent, which received and accepted it upon arrival.

5. Respondent has paid complainant $5,098.50 for the July 9, 1984, load, but has failed to make any additional payments to complainant.

6. On [illegible]

firmation to the shipper and our invoice for 20¢ brokerage. We reported the results of the federal inspection that Corgan relayed to us, and went on record with there [sic] sales man Mr. Ed Senini and sent a copy to the shipper.

8. The July 13, 1984, load of melons was shipped in interstate commerce to respondent, which received and accepted it. Respondent secured a federal inspection of the cantaloupes only.

9. Respondent has paid complainant $3,126.00 for the 1,092 cartons of melons, but has failed to make any additional payments to complainant.

10. A formal complaint was filed on January 19, 1985, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Complainant's assertions that it sold respondent the July 9, 1984, load and consigned to respondent the July 13, 1984, load are denied by respondent. Respondent claims that it purchased both loads on an f.o.b. basis from the broker, assuming he was the seller. Respondent also asserts that the melons were in bad condition on arrival and, consequently, the broker agreed to certain price adjustments.

While the record contains evidence supporting the positions of both parties, the most convincing evidence consists of statements and documents issued by the broker, who is presumed to be without bias. The broker's December 20, 1984, letter (Finding of Fact 7) and the enclosed confirmations of sale make it clear that he was engaged only as a broker between complainant, the seller, and respondent, the buyer. The letter says further that both loads were sold on an f.o.b. basis, and this is supported by his confirmations, to which neither party objected. According to these confirmations, the contract price was $6,298.50 for the July 9, 1984, load and $4,292.40 for the July 13, 1984, load. We believe the broker's confirmations reflect the agreed upon contract terms.

In respondent's unsworn answer, it does not deny receiving or accepting the two loads of melons and, therefore, is liable for the agreed upon contract prices therefor, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983).

Respondent has not presented any credible evidence to support its claim that it owes less than the full contract price of $6,298.50 to complainant for the July 9, 1984, load and is thus liable for that amount.

With respect to the July 13, 1984, load, respondent contends that the melons were in poor condition and, therefore, it agreed with the broker to adjust the prices to $3.50 per carton for the cantaloupes, $2.25 per carton for the honeydews, $4.00 per carton for the crenshaws, and $2.00 per carton for the casabas. The record does indicate that a federal inspection was taken on July 19, 1984, of the 420 cartons of cantaloupes contained in the July 13, 1984, load. Since respondent's claim that the adjusted price resulting from this inspection was $3.50 per carton, which is greater than the $3.30 per carton set forth in the broker's confirmation, we will accept respondent's admission of liability. There is no evidence whatsoever that any of the other melons comprising the July 13, 1984, load were in anything but good condition, and thus we will apply the price set forth in the broker's confirmation for all commodities except the cantaloupes. We, therefore, find the adjusted purchase price to have been $4,376.40.

Respondent incurred liability of $6,298.50 for the July 9, 1984, load and $4,376.40 for the July 13, 1984, load, for a total of $10,674.90. Having paid complainant $8,224.50, respondent owes an additional $2,450.40, and its failure to pay complainant this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,450.40, with interest thereon at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FOUR STAR TOMATO, INC., *v.* TOMATOES, INC., PACA Docket No. 6834. Decided May 15, 1986.

Burden of proof—special agreement as to price—reparation awarded.

In f.o.b. sale of tomatoes respondent alleged that the invoice prices were incorre and that instead the parties had a special agreement that price was to be based the prices which respondent was paying to other packing houses for tomatoes. F spondent was found to have failed to prove its contentions by a preponderance the evidence.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,124.00 in connection with the shipment in interstate commerce of two truckloads of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which failed to file a timely answer, and was found to be in default. A default order was issued on March 20, 1985, and on April 1, 1985, respondent filed a petition to reopen this proceeding after default. On April 16, 1985, the default order of March 20, 1985, was stayed, and complainant was served with a copy of respondent's petition, and given 15 days in which to file an answer thereto. On May 24, 1985, after receipt of complainant's answer to respondent's petition, respondent's default was set aside, and respondent's answer which had been previously submitted was ordered filed. In its answer respondent denied any liability to complainant on the two tomato transactions.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Four Star Tomato, Inc., is a corporation whose address is P.O. Box 470, Ellenton, Florida.

2. Respondent, Tomatoes, Inc., is a corporation whose address is New York City Terminal Market, 400–402 Room D, Bronx, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 11, 1984, complainant sold to respondent 504 25 pound cartons of 5×6 and larger tomatoes at $9.00 per carton, and 1,080 25 pound cartons of 6×6 tomatoes at $7.00 per carton, plus $.15 per carton for palletizing, or a total of $12,333.60, f.o.b. The tomatoes were federally inspected at shipping point in Palmetto, Florida on May 11, 1984, and found to grade U.S. combination with at least 85% U.S. No. 1 quality, and no decay. Complainant shipped the tomatoes to respondent on May 12, 1984, and issued its invoice for such tomatoes on May 18, 1984.

4. On May 12, 1984, complainant sold to respondent 504 25 pound cartons of 5×6 and larger tomatoes at $9.00 per carton, 360 25 pound cartons of 6×6 tomatoes at $6.00 per carton, 216 25 pound cartons of 5×6 and larger U.S. No. 2 tomatoes at $7.50 per carton, 72 25 pound cartons of 6×6 U.S. No. 2 tomatoes at $4.50 per carton, 360 25 pound cartons of 5×6 and larger U.S. No. 3 tomatoes at $4.50 per carton, and 72 25 pound cartons of 6×6 U.S. No. 3 tomatoes at $3.50 per carton, plus $.15 per carton for palletizing, or a total of $10,749.60, f.o.b. On May 12, 1984, the tomatoes were federally inspected at Palmetto, Florida, and the 504 5×6 and larger tomatoes, and the 360 6×6 tomatoes were found to grade U.S. combination with at least 80% U.S. No. 1 quality, and no decay. The remaining tomatoes were found to grade in accord with the contract specifications with no decay. Complainant shipped the tomatoes from loading point in Florida to respondent on May 14, 1984, and issued its invoice covering such tomatoes on May 19, 1984.

5. Respondent accepted both shipments of tomatoes upon arrival at destination, and has paid complainant only $11,253.60 toward the shipment of May 12, and $9,705.60 toward the shipment of May 14, 1984. There remains due and owing from respondent to complainant a balance of $2,124.00.

6. The formal complaint was filed on October 15, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the balance of the purchase price of two shipments of tomatoes. Respondent alleges that complainant is charging the wrong prices for the tomatoes, and that "the prices were to be based on the Market price that was sold to us by other packing houses at that time." Respondent submitted copies of two invoices from another Florida packer in support of this contention. However, the two invoices are dated May 17, 1984, and May 18, 1984, and these dates do not correspond to the sale dates of the two loads of tomatoes in question here. Furthermore, the invoices submitted by respondent do not disclose the grade of

the tomatoes that are listed thereon. Later in the proceeding respondent submitted one additional invoice dated May 11, 1985, but covering a shipment of May 9, 1985. This invoice shows 5×6 tomatoes selling at $4.50 per container, and 6×7 tomatoes selling at $2.00 per container. Again this invoice fails to show the grade of the tomatoes in question.

Complainant denied respondent's allegations in regard to the pricing method applicable to the two loads of tomatoes, and submitted a copy of a May 11, 1984, Market News Report covering f.o.b. prices of tomatoes in South and Central Florida which shows that the prices charged by complainant were in accord with the market prices disclosed thereon. Although respondent states that upon receiving the invoices sent by complainant, it called complainant on the telephone and complained, respondent did not object to such invoices in writing. On the basis of all of the evidence herein we conclude that respondent has failed to prove its contention in regard to the pricing of the tomatoes by a preponderance of the evidence. We also conclude that complainant has proven by a preponderance of the evidence that the prices listed in its invoices were the contract prices agreed upon by the parties. Respondent is liable to complainant for a balance of $2,124.00 on the two loads of tomatoes. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,124.00, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

LYN-DE FARMS, INC., v. MIDWEST PRODUCE BROKERAGE, INC., P&S Docket No. 2-6925. Decided May 16, 1986.

With acceptance burden shifts to respondent to show breach and damages—reparation awarded.

Respondent claimed that complainant had authorized deductions off the purchase invoice which complainant denied. A letter from complainant's salesman instructing respondent to pay the invoice price and he would make it up to him at some other time established that there was no agreement as to a price adjustment. Respondent therefore was required to pay invoice price unless it proved damages for which contention it offered no evidence. Respondent was ordered to pay invoice price less amount already remitted.

Peter V. Train, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $307.88 in connection with the sale of two loads of lettuce in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant.

Respondent filed an answer in which it denied liability. It admitted the purchase of the lettuce, but alleged that with respect to the first load it was authorized a deduction off the invoice price because the lettuce was not of the size warranted. With respect to the second load, respondent alleged that complainant agreed to a $.25 per carton adjustment.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 CFR § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Neither party submitted additional evidence, but complainant did file a brief. Respondent did not file a brief.

FINDINGS OF FACT

1984, complainant shipped 711 cartons of lettuce at a price of $2.50 per carton plus $.65 for cooling or a total contract price of $2,239.65. On December 7, 1984, complainant shipped 328 cartons at a per carton price of $2.75 plus $.65 for cooling or a total price of $1,115.20 for this transaction. The total contract price for the two loads was $3,354.85.

5. Respondent has remitted a total of $3,046.97 for these purchases.

6. The formal complaint was filed May 21, 1985, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

This case involves a dispute over whether there was an agreement as to a price adjustment on each of the two shipments. Respondent contends that the size of lettuce in the first shipment was not as warranted, and that complainant authorized respondent to make an appropriate deduction. Respondent further alleges that it was given a $.25 per carton adjustment by complainant on the day of arrival of the second load. In support of its claim respondent attaches a letter from complainant's salesman. A review of the letter, however, demonstrates that Mr. Zinno, complainant's salesman, denied agreeing to any deductions or adjustments.

Having accepted the goods, respondent must pay contract price less any provable damages. The invoices are the best evidence of the contract price. Respondent has the burden of proving that an adjustment to the invoice price was agreed to. The letter from Mr. Zinno contains the following sentence: "In our last conversation I told him [respondent] to pay the invoices as they were billed and I would make it up to him at some other time." What Mr. Zinno might have agreed to do at some future time is unclear. However, the letter specifically states that Zinno expected respondent to pay full contract price. Respondent's own evidence demonstrates that no agreement as to an adjustment of the invoice price was reached. Respondent offers no evidence to support its claim that the lettuce on the first load was not of the size warranted. It has, therefore, failed to show any damages as to either load.

Respondent is liable to pay the entire contract price of $3,354.85. It has remitted only $3,046.97, leaving a deficiency of $307.88.

The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of $307.88, with interest.

Within 30 days from the date of this order, respondent shall pay to complainant $307.88 as reparation with interest thereon at the rate of 13 percent per annum from January 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

DEW-GRO, INC., a/t/a CENTRAL WEST PRODUCE, *v.* BEACON PRODUCE CO., PACA Docket No. 2-7108. Decided May 16, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,150.50 in connection with a shipment of broccoli in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dew-Gro, Inc., a/t/a Central West Produce, is a corporation whose address is 1284 West Main Street, Santa Maria, California 93454. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,150.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation $6,150.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DELAWARE PRODUCE GROWERS, INC., v. BEACON PRODUCE CO., PACA Docket No. 2-7113. Decided May 16, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *Pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,644.60 in connection with three shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Delaware Produce Growers, Inc., is a corporation whose address is Route 4, Box 127, Dover, Delaware 19901. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $4,644.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,644.60, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

Copies of this order shall be served upon the parties.

BLUE ANCHOR, INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7106. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $27,880.50 in connection with six shipments of mixed fruit in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Blue Anchor, Inc., is a corporation whose address is P. O. Box 15498, Sacramento, California 95851. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $27,880.50. Accordingly, within 30 days from the date of this

respondent shall

PECOS CANTALOUPES CO., INC. *v.* BEACON PRODUCE CO., PACA Docket No. 2-7107. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $8,064.00 in connection with a shipment of cantaloupes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Pecos Cantaloupes Co., Inc., is a corporation whose address is P. O. Box 1389, Pecos, Texas 79772. Respondent, Beacon Produce Company, is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $8,064.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $8,064.00, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DICK BARRETT PRODUCE, INC., a/t/a BARRETT-FISHER CO., INC., v. BEACON PRODUCE CO., PACA Docket No. 2-7109. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,612.50 in connection with a shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dick Barrett Produce, Inc. a/t/a Barrett-Fisher Company, is a corporation whose address is P. O. Box 750, Hereford, Texas 79045. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $5,612.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,612.50, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

DYNASTY FARMS, INC., v. BEACON PRODUCE CO., PACA Docket No. 2-7110. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,981.60 in connection with a shipment of cantaloupes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issurance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dynasty Farms, Inc., is a corporation whose address is 9123 North Cave Creek, Phoenix, Arizona 85020. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under theAct.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,981.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,981.60, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ROBERT L. MEYER, d/b/a MEYER TOMATOES, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7125. Decided May 19, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,920.00 in connection with three truckloads of tomatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Robert L. Meyer, d/b/a Meyer Tomatoes, is an individual whose address is P. O. Box 606, King City, California 93930. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,920.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $6,920.00, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ACTION PRODUCE, v. INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7126. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,989.50 in connection with three truckloads of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Action Produce, is a partnership composed of Rala Singh, Pat H. Hodges, Davis Packing Co., and John Kai. The partnership's mailing address is P. O. Box 1712, Glendale, Arizona 85311. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,989.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation $1,989.50, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO., INC., *v.* BEACON PRODUCE CO., PACA Docket No. 2-7112. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $16,798.50 in connection with two shipments of grapes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California 94111. Respondent, Beacon Produce Co., is a corporation whose address is 401 S.W. 2nd Street, Pompano Beach, Florida 33060. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $16,798.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $16,798.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

RONALD J. BALL and ALFRED V. BALL, d/b/a BALL BROS. PRODUCE, COMPANY *v.* BEACON PRODUCE CO., PACA Docket No. 2-7115. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $18,737.50 in connection with the shipment of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant is a partnership composed of Ronald J. Ball and Alfred V. Ball, d/b/a Ball Brother Produce Company whose address is P. O. Box 69, Lewisville, Idaho 83431. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida 33069. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $18,737.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $18,737.50, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J. A. WOOD CO. - VISTA, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7123. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,336.50 in connection with shipments of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, J. A. Wood Co. - Vista, Inc., is a corporation whose address is P. O. Box 9069, Phoenix, Arizona 85068. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,336.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,336.50, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7124. Decided May 20, 1986.

Admission of debt—Reparation.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,125.00 in connection with two truckloads of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Nick Delis Company, Inc., is a corporation whose address is P. O. Box 1089, Millbrae, California 94030. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $2,125.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation $2,125.00, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J. A. WOOD CO. - VISTA, INC., a/t/a J. A. WOOD CO., *v.* BEACON PRODUCE CO., PACA Docket No. 2-6860. Decided June 2, 1986

Contract terms changed—protection for labor and shrinkage—deductions reasonable—reparation awarded.

The evidence is clear that complainant granted respondent protection for labor and shrinkage after the cantaloupes arrived in a deteriorated condition. Responde

thus sustained its burden of proving that the original contract terms were changed to reflect this grant of protection. Respondent's deductions for labor and shrinkage were reasonable considering the condition of the cantaloupes. Respondent, therefore, held without liability to complainant.

Andrew N. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Michael Paul Shienvold, Esquire, Fort Lauderdale, FL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,910.35 in connection of the sale and shipment of a trucklot of cantaloupes and green onions to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be a part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and respondent submitted an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, J. A. Wood Co. - Vista, Inc. a/t/a J. A. Wood Co., is a corporation whose address is P. O. Box 9069, Phoenix, Arizona.

2. Respondent, Beacon Produce Co., is a corporation whose address is 1401 S.W. 2nd Street, Pompano Beach, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately October 30, 1984, complainant sold to respondent a trucklot of cantaloupes and green onions. The contract price for the 756 cartons of cantaloupes was $7.00 per carton, plus $.80 per carton for cooling and palletizing. The contract price for the 75 cartons of green onions was $5.95 per carton, plus $.65 per carton for hydrocooling, and $8.00 for top ice. An additional $124.65

was charged for brokerage, for a total contract price of $6,524.45 f.o.b. for both commodities. John M. Baum, Atlantic Beach, Florida, acted as the broker in the proceeding, and both parties communicated through him.

4. The truckload of cantaloupes and green onions was shipped by complainant in interstate commerce to respondent, where it arrived on November 5, 1984, and was subjected to a federal inspection. The inspection found no condition problems with the green onions, but with respect to the cantaloupes found as follows:

> VARIOUS CONTAINERS Range 38° *To 42°*
>
> SHIPPER: J. A. Wood
>
> Cantaloupes—"Copperhead Brand" marked to denote count (15's 18's and 23's noted).
>
> Applicant States 210 ctns 15, 420 ctns 18's, 126 ctns 23's.
>
> CONDITION: Firm. Green color. Decay in most cartons 1 to 5 melons (6 to 22%) in some none, average 10% mostly Cladosporium Rot, some Fusarium Rot.

5. After receiving the inspection results, respondent contacted the broker and complained about the condition of the cantaloupes. The broker contacted complainant's employee, Jake McManus, and informed him of the condition problems. Mr. McManus agreed to grant respondent protection for labor and shrinkage on the cantaloupes. That same day, the broker sent a letter to complainant, with a courtesy copy to respondent, stating as follows:

> This will confirm our conversation with Mr. Jake McManus on 11/5/84, in which it was agreed that you are granting Beacon Produce Company, Pompano Beach, FL, protection for labor and shrinkage on 756 cantaloupes, shipped 10/31/84, via Jim McDonald Truck. Account USDA inspection 11/5/84, Pompano Beach, FL, shows temperatures 40-42°; *range 1-5 melons per carton in most samples (6-22%) some more, average 10% damage by cladisporium [sic] and fusarium rot.*

6. Respondent eventually paid complainant $2,614.10 for the green onions and cantaloupes. Along with its payment, respondent sent copies of the November 5, 1984, inspection and subsequent November 29, 1984, federal inspection of 297 cartons of cantaloupes showing 100% decay. Respondent also sent a statement explaining its deductions. The statement indicated that respondent had deducted $1.00 per carton, or $756, for handling, $3,133.35 for the

value of 297 cartons of cantaloupes dumped at $10.55 per carton, and $21.00 for a dump certificate.

7. Respondent has failed to make any additional payment to complainant for the cantaloupes.

8. A formal complaint was filed on April 15, 1985, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

Respondent contends that after the truckload of cantaloupes and green onions arrived, and the cantaloupes were found to be in a deteriorated condition, complainant agreed to grant protection and handling. Complainant denies ever changing the original contract terms, claiming that when it received notice of the November 5, 1984, inspection results, the parties mutually agreed that at a later date, following sales, a settlement would be made if determined to be necessary. Complainant also alleges that the cantaloupes were mishandled, evidenced by the fact that 297 cartons were still on hand and needed to be dumped over three weeks after they arrived at respondent's place of business.

The first issue to be determined is whether the contract terms were changed to allow respondent protection for labor and shrinkage, as respondent claims. It is respondent's burden to prove that the contract terms were altered. *American Banana Co. Inc.* v. *Marvin Gray*, 41 Agric. Dec. 539 (1981). The record contains a letter to complainant from the broker dated November 5, 1984, stating that on that same date, pursuant to a discussion with complainant's Jake McManus, complainant granted respondent protection for labor and shrinkage on the cantaloupes (Findings of Fact 5). That letter also related that the November 5, 1984, inspection showed temperatures of from 40 to 42°F and decay in the

or any other significant evidence in this regard, we conclude that respondent has sustained its burden of proving it was granted protection for labor and shrinkage.

Respondent claims that it incurred expenses of $776.00 for resorting the cantaloupes, damages of $3,133.35 consisting of the contract price plus freight of the 297 cartons it had to dump, plus $21.00 for the cost of a dump certificate, totaling $3,910.35. Complainant argues that since 297 cartons of melons were not sold after three weeks and dumped, it is evident that respondent did not properly handle them. We believe that since the cantaloupes had been resorted, no more than 150 cartons should have been unsaleable. Respondent's damages are thus $3,910.35, less the contract price plus freight of $10.55 per carton for the 147 cartons it should have been able to resell, or $2,359.50, plus the charges for resorting and a dump certificate, totaling $3,156.50. Accordingly, complainant was entitled to receive the difference between the contract price of $6,524.45 and its damages of $3,156.50, or $3,367.95. Since respondent has already paid $2,614.10, it remains liable for an additional $753.85, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $753.85, with interest thereon at the rate of 13% per annum from December 1, 1984, until paid.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC., v. EARLES J. SCHMUCKER, and WAYNE A. SCHMUCKER d/b/a SCHMUCKER'S POTATO STORAGE, PACA Docket No. 2-6907. Decided June 2, 1986.

Effect of broker's statements—meaning of f.o.b. prices, delivered sale as to grade and condition—modification of contract by consent of parties—liability for freight—reparation awarded.

Where parties disagreed as to terms of contract the broker's statements were determinative of the actual terms. Since contract was f.o.b. as to price and delivered as to grade and condition; respondent/receiver was liable for freight, but seller was responsible for deterioration while goods were in transit. Where complainant agreed to a modification of the contract without conditions, but asked for an inspection which it did not receive, it was still held to the terms of the modified contract.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $6,329.89 in conjunction with a shipment of a rail car of potatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto in which it denied the allegations contained in the complaint. Because the amount claimed as damages is less than $15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and respondent filed an answering statement. Although given an opportunity to do so neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Nick Delis Company, Inc., is a corporation with an address at P.O. Box 1089, Millbrae, California 94030.

2. Respondent, Earles J. Schmucker, and Wayne A. Schmucker, d/b/a Schmucker's Potato Storage is a partnership with an address at Route 2, West Unity, Ohio 43570. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 15, 1984, complainant sold to respondent a rail car of potatoes, free on board as to price with a delivered sale as to grade and condition. The load of potatoes consisted of 665 sacks of U.S. No. 1 White rose potatoes and 435 sacks of U.S. No. 2 White rose potatoes. A temperature recorder was also placed upon the rail car.

4. William Schaub & Company, Indianapolis, Indiana, acted as the broker with respect to this transaction. The broker issued an initial memorandum of sale which stated that the contract was "Price Arrival". The corrected memorandum showed that the price of the 665 sacks of U.S. No. 1 potatoes was $7.00 [illegible]

price of the 435 sacks of U.S. No. 2 potatoes was $6.00 per sack. Both memorandums showed "Fob prices, delivered sale as to grade and condition at destination."

5. The potatoes were shipped in interstate commerce, and arrived at respondent's place of business on or about May 25, 1984, where they were received and accepted by respondent. Upon receipt of the potatoes respondent complained that they were not in good condition. Such complaint was conveyed to the broker, which conveyed the complaint directly to the complainant along with respondent's request for protection for shrinkage and labor as a result of decay. Complainant agreed with the request of respondent for protection for shrinkage and labor, and asked for a Railroad Perishable Inspection Agency (RPIA) inspection.

6. Respondent sorted and repacked the potatoes, and provided to complainant an accounting which showed that there were 8,475 pounds of culls, which should have been No. 1 potatoes, but which it valued at half price, claiming a credit of $448.00; that extra labor incurred over and above normal labor for sorting was $188.00; that 345 hundredweight at an average price of $6.40 per hundredweight of potatoes were dumped for a total cost of $2,208.00; that the freight for those potatoes which were dumped deducted from the total freight charge was $1,225.00; that it took a price adjustment of $1,765.00; and that pursuant to a separate agreement between itself and complainant it was deducting $500.00 for additional freight, for a total deduction of $6,334.00. Respondent paid complainant $2,722.61 as the difference between the total claimed as a credit and the invoice price of $9,052.50 of complainant.

7. A formal complaint was filed in this proceeding on March 4, 1985. An informal complaint was filed on November 9, 1984, which was within nine months of the time the cause of action herein accrued.

CONCLUSIONS

This proceeding involves a dispute as to several aspects of the contract, as originally entered, and subsequently as modified by the parties. Complainant contends that the contract was free on board as to price, and delivered as to grade and condition. It contends that the price charged for the potatoes was $9.00 per sack for 665 sacks of U.S. No. 1 potatoes and $7.00 per sack for 435 sacks of U.S. No. 2 potatoes, plus $22.50 for a temperature recorder, for a total contract price of $9,052.50. Respondent, on the other hand, contends that the price to be charged by complainant was $7.00 per sack for the U.S. No. 1 potatoes and $6.00 per sack for the U.S. No. 2 potatoes. Complainant also contends that although it accepted re-

spondent's assertions upon its receipt of the potatoes that there was considerable decay, it only agreed to provide respondent protection for shrinkage because respondent is a repacker, and would have to repack the potatoes in any event. Respondent contends that it asked for and received protection both for shrinkage and labor. Complainant also claims that respondent deducted $500.00 more for freight than it should have from its final accounting, which $500.00 was not authorized as a deduction by complainant. Finally, complainant contends that it asked for a Railroad Perishable Inspection Agency inspection, and that respondent failed to provide it sufficient evidence as to the condition of the potatoes based upon such asserted inspection, as a result of which respondent has not proved its damages.

Insofar as the terms of the contract are concerned we accept the statement of William Schaub & Company, the broker for this transaction, because as an ostensibly neutral third party its testimony must be given great weight. *Homestead Tomato Packing Co.* v. *Mims Produce, Inc.*, 43 Agric. Dec. ___ (1984); *Kern Ridge Growers* v. *T.J. Power & Co.*, 48 Agric. Dec. 425 (1981). The broker issued two broker's memoranda for this transaction. The first memorandum did not contain any prices, and stated the contract was "Price Arrival". The second memorandum, which contained the notation "CORRECTED COPY", stated that the prices for the potatoes were $7.00 per sack for the U.S. No. 1 potatoes and $6.00 per sack for the U.S. No. 2 potatoes. It also stated that the freight charge was $3,413.00. Both memoranda also stated that the terms of sale were "Fob prices, delivered sale as to grade a condition at destination". We accept the corrected memorandum of the broker as properly reflecting the terms of sale for the transaction in issue herein. Therefore, we conclude that the price for the U.S. No. 1 potatoes was $7.00 per sack and the price for the U.S. No. 2 potatoes was $6.00 per sack. We also conclude that the original freight charge was $3,413.00.

7 CFR 46.43(dd) is important to a resolution of the meaning of the terms "fob prices, delivered sale as to grade and condition at destination". That provision states:

> "F.O.B. inspection and acceptance arrival" means that the produce quoted or sold is to be placed by the seller free on board car or other agency of through transportation at shipping point, *the cost of transportation to be borne by the buyer*, but the seller to assume all risks of loss and damage in transit not caused by the buyer, who has the right to inspect the goods upon arrival and to reject them if, upon

> such inspection, they are found not to meet the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. *Such a sale is f.o.b. only as to price and is on a delivered basis as to grade, quality, and condition.*" (Emphasis added)

Although the language contained in 7 CFR 46.43(dd) is not exactly the same as the language contained in the broker's memorandum we are drawn to the conclusion that this is what the broker meant because the language "f.o.b. inspection and acceptance arrival" plus the emphasized statements contained thereafter are so close in meaning to the language "f.o.b. prices, delivered sale as to grade and condition at destination." Therefore, we find that the respondent is liable for payment of the transportation costs, and that the prices set forth by the broker are the prices agreed upon between the parties. We further find that the complainant was responsible for any deterioration in grade, quality or condition during the period of transit. As a result respondent had a right to reject the goods on arrival if it found that they did not meet the specifications in the contract of sale. Respondent did not do so. Rather, as shown by the broker's statement, the respondent asked for protection as to both shrinkage and labor. According to the broker complainant agreed to grant such protection. Therefore, it is liable for any costs incurred by respondent with respect to shrinkage or labor.

Although complainant asked for a Railroad Perishable Inspection Agency inspection, and respondent gave it a handwritten piece of paper without date which purported to contain to results of such an inspection, we cannot give credence to that document because it lacks a date, and was not otherwise properly identified as being and actual Railroad Perishable Inspection Agency report. This, however, makes no difference since complainant accepted respondent's request for a modification of the contract, and guaranteed it protection with respect to labor and shrinkage. Insofar as complainant's argument that it would never grant protection with respect to labor is concerned because respondent is a repacker, we reject the claim. Respondent made it clear that it did not claim for normal repacking. Rather it claimed for extra labor charges incurred in the amount of $188.00 above and beyond those which were usual for repacking.

The 665 sacks of No. 1 potatoes at $7.00 per sack came to a total price of $4,655.00. The 435 sacks of U.S. No. 2 potatoes at $6.00 per sack came to a total price of $2,610.00. To those prices should be added $22.50 for a temperature recorder for a total contract price for the potatoes of $7,287.50. As stated above respondent is respon-

sible for the payment of the freight. Therefore, respondent may not deduct the freight costs from the total contract price. Respondent had the burden to show that there was an agreement with respect to an adjustment for freight, and because there was no evidence other than its bald statement that complainant and respondent had such an agreement, we find it did not sustain that burden. We find that respondent's deduction of $448.00 for 8,475 pounds of culls which should have been No. 1 potatoes, but which it valued at half price, warranted a credit in that amount. We find that respondent did incur extra labor in the amount of $188.00 for sorting the potatoes. We also find that its accounting with respect to 345 hundredweight of potatoes which were dumped at $6.40 per hundred weight for $2,208.00 was reasonable. As damages respondent is also entitled to deduct the cost of freight with respect to the dumped potatoes. It computed this cost $1,225.00. However, that calculation was based upon a total freight charge or $3,913.00. We find that the total freight charge in this case which has been proved was $3,413.00. 435 hundredweight is 31.4 percent of 1,100 hundredweight. 31.4 percent of $3,413.00 is $1,071.68. That is the total amount of freight which may be deducted as damages for the dumped potatoes. Therefore, from the total contract price of $7,287.50 there should be deducted $448.00 for culls, $188.00 for labor, $2,208.00 for dumping, and $1,071.68 for freight, for a total deduction of $3,915.68, leaving $3,371.82 as respondent's total obligation with respect to this load of potatoes. Respondent has paid complainant $2,722.61 previously, leaving $649.21 which respondent has not paid complainant. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded, with interest thereon.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant $649.21 with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING, INC., *v.* CORGAN & SON, INC., PACA Docket No. 2-6885. Decided June 5, 1986.

Contract terms—f.o.b. terms supported by evidence rather than open price, price after sale, consignment—burden of proof on buyer to show breach of warranty and damages—breach of warranty not proven by buyer—reparation awarded.

Where the evidence supported the seller's contention that f.o.b. terms were in effect for all six loads of lettuce, and respondent failed to sustain its burden of proving a breach of warranty regarding these loads, respondent is liable for the unpaid contract price.

Andrew N. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $13,958.28 in connection with the sale and shipment of six truckloads of lettuce to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which failed to file an answer thereto, and was held in default. The default was subsequently set aside and respondent filed an answer to the complaint, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Neither party submitted any additional evidence. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Fresh Western Marketing, Inc., is a corporation whose address is P.O. Box 5275, Salinas, California.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. From October 12, 1983, through December 24, 1983, complainant sold and shipped to respondent, in interstate commerce, six truckloads of lettuce on an f.o.b. basis. Bills of lading were prepared for each load, reflecting the quantity, truck number (except for the October 12, 1983, sale), and desired temperature range of 33°F to 36°F. The terms of sale and shipment for each load were as follows:

Date of Sale	Number of Cartons	F.O.B. Price	Truck Number
October 12, 1983	324	1,863.00	Not Listed
November 11, 1983	875	11,068.75	CABT03628
November 16, 1983	900	6,097.50	CRSZ550011
November 26, 1983	902	6,683.82	VA132012
November 30, 1983	1250	9,585.00	SFRC56002
December 24, 1983	825	8,916.25	CRAZ520629
	Total	$44,214.32	

4. All six truckloads were accepted by respondent upon their arrival at its place of business.

5. On October 20, 1983, respondent had the October 12, 1983, load federally inspected, which resulted as follows:

Products Inspected: LETTUCE, Iceberg type in cartons branded "Green Crest 2 doz. heads, California Coastal Farms, Inc., Salinas, California". Applicant States: 324 cartons.

. . .

Temperature of Product: Ranges 37 to 38F.

Condition: Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper Leaves:* No decay. *Head Leaves:* 1 to 3 heads per carton, average 9% damage by discoloration following bruising scattered throughout pack. 2 to 4 heads per carton, average 13% Bacterial Soft Rot in various stages affecting 1 to 2 leaves.

Remarks: Applicant states stock unloaded from AT-91328CA.

6. On November 15, 1983, respondent secured a federal inspection of what it claims to be the November 11, 1983, load. The inspection found as follows, in relevant part:

INITIAL & NO. IMSZ560123

VARIOUS CONTAINERS Range 38° *To 39°F.*

Lettuce Iceberg type in cartons branded "King O' Hearts Lettuce 2 Doz. Heads CA".

Applicant states 875 cartons.

Wrapper Leaves: Average 2% Decay.

Head Leaves: 1 to 2 heads in most cartons none in some average 5% damage by discoloration following bruising. 1 to 4 decayed heads in most cartons, none in many average 8% Bacterial Soft Rot in various stages affecting from 1 to 2 leaves.

REMARKS Inspection restricted to initial 100 cartons being unloaded and in 2 incomplete stacks nearest rear doors.

7. On November 22, 1983, complainant had the November 16, 1983, load federally inspected. The inspection revealed as follows, in relevant part:

INITIAL & NO. CRSZ550011

VARIOUS CONTAINERS Range 40 To 43°*F.*

LETTUCE, Iceberg type "King O' Hearts, 2 dozen heads."

Applicant states: Approximately 500 cartons remaining on van.

Condition: 1 to 5 heads in most cartons, none in some, average 9% damage by Tipburn. 2 to 8 heads per carton average 20% Bacterial Soft Rot in various stages affecting 1 to 4 leaves mostly following Tipburn.

REMARKS Restricted to approximately 300 cartons being unloaded at time of inspection and 5 stacks nearest rear doors.

8. On December 12, 1983, respondent had the November 30, 1983, load federally inspected. The inspection revealed as follows, in relevant part:

INITIAL & NO. SFRC56002

VARIOUS CONTAINERS Range 38° *To 39°F.*

Lettuce, Iceberg type in cartons branded "King O' Hearts 2 Dozen Calif."

Applicant states approx. 700 cartons.

Condition: *Wrapper Leaves:* No decay. *Head Leaves:* 1 to 3 heads in most cartons none in some average 6% damage by Russet Spotting. 1 to 7 heads per carton average 15% damage by tipburn. 1 to 4 decayed heads in most cartons none in many average 7% Bacterial Soft Rot in various stages affecting 1 to 2 leaves.

* * * * * * *

REMARKS Inspection restricted to approximately 125 cartons being unloaded at time of inspection and in 2 incomplete stacks each end of car in that portion of load remaining at time of inspection.

ary 4, 1983, complainant had the December 24, 1983, inspected. The inspection found as follows, in rele-

AZ570629

* * * *

Restricted to approximately 100 cartons being unloaded at time of inspection and in 2 incomplete stacks nearest rear doors.

* * * * * * *

TEMPERATURES 42 to 44°*F.*

10. Respondent has paid complainant a total of $30,256.04 for the six loads, consisting of $624.54 for the October 12, 1983, load, $7,568.75 for the November 11, 1983, load, $4,297.50 for the November 16, 1983, load, $6,314.00 for the November 26, 1983, load $5,835.00 for the November 30, 1983, load, and $5,616.25 for the December 24, 1983, load. Respondent has failed to pay any part of the $13,958.28 which complainant claims is still due and owing for the six truckloads.

11. An informal complaint was filed on April 23, 1984, which was within nine months from when the causes of action herein accrued. A formal complaint was filed on December 4, 1984.

CONCLUSIONS

Respondent denies liability, claiming that the six loads of lettuce it admittedly received and accepted were severely deteriorated, and respondent was thus justified in remitting to complainant only the net proceeds obtained on resale. Respondent contends that after it informed complainant of the condition problems, complainant agreed to allow it to handle the November 11, 1983, and November 16, 1983, loads on consignment. Further, respondent contends that the November 13, 1983, load was sold on an open price basis, and the November 26, 1983, load had price after sale terms in effect.

The first issue to be resolved is that of the contract terms agreed to by the parties. In its sworn complaint, complainant asserts that f.o.b. terms were in effect for all six loads. Respondent's allegations that certain transactions had open price or price after sale terms are made in unsworn letters to the Department, which can be given little weight as evidence. We thus conclude that all six loads were sold on a f.o.b. basis. Respondent's contention that complainant agreed to a consignment for two loads after learning of the condition problems is set forth in an unsworn letter to the Department in which respondent states it was told to "do the best we could." As respondent's allegations are unsworn, they cannot be given significant weight. Further, we have stated in previous cases that language such as "do the best you can with it" does not constitute authorization for handling on consignment. *Relan Produce Farms* v. *Rushton & Co., Inc.*, 38 Agric. Dec. 1686 (1979).

Since respondent admittedly received and accepted the six loads of lettuce, it became liable for the contract price minus damages resulting from any breach of warranty, which respondent has the burden of proving by a preponderance of the evidence. *Growers Exchange, Inc.* v. *Central Carolina Grocers, Inc.*, 42 Agric. Dec. 666 (1983). As we have determined that these were f.o.b. sales, complainant gave the implied warranty of suitable shipping condition, which, as stated in 7 CFR 46.43(j), "in relation to direct shipments, means that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." Respondent has submitted inspection reports which it contends prove that complainant breached its warranty with respect to five out of the six truckloads of lettuce. However, examination of these inspection reports does not bear out respondent's contentions.

The October 20, 1983, inspection of the October 12, 1983, shipment shows nine percent damage by discoloration following bruising and 13 percent decay, but was taken eight days after shipment. This is two to three days longer than the normal transportation time from complainant's location in Salinas, California, to respondent in Bronx, New York. We find that transportation conditions in this load were therefore abnormal, which voided the suitable shipping condition warranty.

The record contains a November 15, 1983, inspection, which respondent claims covers the November 11, 1983, shipment. However, the bill of lading for the 875 cartons shipped on November 11, 1983, shows that they were loaded onto truck number CABT03628, and the November 15, 1983, inspection submitted by respondent shows the 875 cartons inspected on truck number IMSZ560123. This casts doubt as to whether the lettuce inspected was the same as was loaded onto the truck by complainant. In any event, the inspection report make clear that the inspection was restricted to only 100 cartons being unloaded and two incomplete stacks nearest the rear doors. This is a small percentage of the 875 cartons contained in the load and cannot be considered to reflect the condition of the entire load. Therefore, no breach of warranty has been established by respondent for the November 11, 1983, load.

The November 22, 1983, inspection, which respondent secured on the November 16, 1983, shipment, was also restricted, as only 500 of the 900 cartons remained in the truck at the time of inspection, and the report states that the inspection was limited to only 300 cartons being unloaded and five stacks nearest the rear doors. Further, the pulp temperature was 40 to 43°F, which is too high and

evidences improper handling by respondent. We thus do not accept the November 22, 1983, inspection as an accurate representation of the condition of the lettuce when it arrived at respondent's place of business, and find no breach of warranty by complainant.

There is no evidence of any inspection having been taken on the November 26, 1983, truckload, and we have held that this was an f.o.b. sale rather than a price after sale, as respondent contends. Therefore, respondent is liable for the contract price.

The record contains an inspection report dated December 12, 1983, covering the November 30, 1983, truckload. The 12 day span of time between the shipping date and the date of inspection is much too long and renders the inspection results completely without evidentiary value. Even if the inspection had been timely, the report makes clear that it was restricted to 125 cartons and two incomplete stacks out of the 1,250 cartons shipped, an insignificant percentage. There is no credible evidence of any breach of warranty in this transaction.

The January 4, 1984, federal inspection took place 11 days after shipment of the December 24, 1983, truckload, which is also an excessive period of time. Further, the inspection was restricted to only 100 cartons being unloaded at the time of inspection and two incomplete stacks nearest the rear doors, a small percentage of the 825 cartons contained in the December 24, 1983, truckload. Therefore, respondent has not proven a breach of warranty regarding this transaction as well.

We have concluded that respondent has failed to sustain its burden of proving a breach of warranty by complainant regarding any of the six shipments of lettuce at issue. Therefore, respondent was obligated to pay the entire contract price of $44,214.32 but paid only $30,256.04, leaving a balance due and owing of $13,958.28. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $13,958.28, with interest thereon at the rate of 13 percent per annum from February 1, 1984, until paid.

Copies of this order shall be served upon the parties.

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING, *v.* GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL, PACA Docket No. 2-6824. Decided June 12, 1986.

F.o.b. sale and acceptance following arrival—affirmative defenses not proven by a preponderance of the evidence—condition of produce on arrival must be proven by neutral inspection—damages not awarded on basis of speculative profits—reparation awarded.

Complainant sold and shipped to respondent several loads of produce on an f.o.b. basis. Respondent raised several affirmative defenses which were not proven by a preponderance of the evidence. In particular, respondent's claim that the produce arrived in poor condition was not supported by neutral inspections. Respondent's counterclaim was based on the alleged destruction of respondent's business by complainant's shipment of inferior product, and was found to be not proven. In addition the damages sought for the alleged destruction of respondent's business were stated to be speculative and therefore were not recoverable in any event.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $51,425.26 in connection with the shipment in interstate commerce of six truckloads of tomatoes, one partial truckload of bell peppers and pickling cucumbers, and one truckload of red bell peppers.

›y of the formal complaint was served upon respondent efaulted in the filing of an answer. Later respondent filed a to reopen after default, and such motion was served upon nant. Complainant did not object to reopening, and on May this proceeding was reopened, and a proposed answer presubmitted by respondent was ordered filed. Respondent's denied liability to complainant, and also included a coun- in the amount of $548,070 based in part on previous transwith complainant. Complainant filed a reply to the counterlenying any liability thereunder. The Department did not ›port of investigation.

›ugh the amount claimed in the formal complaint and coun- exceeds $15,000.00, the parties waived oral hearing, and rtened method of procedure provided in section 47.20 of the f Practice (7 CFR § 47.20) is applicable. Pursuant to this pro-

cedure, the verified pleadings of the parties are considered a part of the evidence in the case. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and Respondent filed an answering statement. Complainant did not file a statement in reply. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Kent W. Northcross, is an individual doing business as Northcross Distributing, whose address is Rio Rico Industrial Park, Nogales, Arizona. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, George Villalobos, is an individual doing business as Teksun Brand International, whose address is 1865 Decatur Drive, San Jose, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between February 23, and March 12, 1984, complainant sold to respondent and shipped from Nogales, Arizona to respondent in San Jose, California, six truckloads of tomatoes, one partial truckload of red bell peppers, and one partial truckload of mixed bell peppers and pickling cucumbers, for invoice prices totalling $73,981.25, f.o.b.

4. Respondent accepted all of the subject produce and has paid complainant a total of $12,997.59 therefor. In addition complainant has granted respondent allowances on the produce in the total amount of $14,216.40. There remains due and owing from respondent to complainant the sum of $46,767.26.

5. The formal complaint was filed on September 4, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent does not dispute the quantities of perishable produce which complainant alleges were sold to respondent, nor does respondent dispute the original invoice prices applicable to such produce. However, respondent set forth several affirmative defenses which he had the burden of proving by a preponderance of the evidence. See *NewMiller Farms* v. *Nicolls*, 36 Agric. Dec. 1230 (1977) and *Walker & Hagen Packing House* v. *Amato Bros. Tomato Distributors, Inc.*, 27 Agric. Dec. 1543 (1968). Respondent alleges that on arrival the produce did not conform to the quality agreed upon between the parties when the contracts for the produce were entered. Respondent alleges that it agreed to purchase "number one product" but that complainant shipped inferior product. Respondent further alleges that it refused to accept the commodities

as shipped, but at complainant's insistence agreed to receive th product "without obligation and without price." Respondent fu ther alleges that it has "refused to pay for said balance, because c the devastating consequences, complainant's product had upon m business." Respondent then sets forth a counterclaim based upo complainant's alleged destruction of its business, and the specula tive profits which respondent alleges its business would have real ized over the next three years. This claim is easily resolved since i was established many years ago that damages cannot be awarde based on speculative profits. *Heller Bros. Co. Inc.* v. *Associate Fruit Distributors of California,* 4 Agric. Dec. 1002 (1945).

The documentation relative to the eight shipments of produce no where indicates that there was an agreement between the partie that the produce was to be U.S. No. 1, or any other specified qual ity. Respondent has presented us with no credible evidence tha any such quality was agreed to. Furthermore respondent did no submit any federal inspection reports covering the produce, an has therefore failed to substantiate its allegations in regard to th poor condition or quality of the produce on arrival. See *Mutua Vegetable Sales* v. *Select Distributors,* 38 Agric. Dec. 1359 (1979). W find that respondent has failed to substantiate its allegations i regard to an agreement subsequent to arrival that the produce wa received "without obligation and without price". In addition w find that respondent accepted the produce and has not proven any breach of contract on the part of complainant. Accordingly, re- spondent is liable to complainant for the full purchase price of the produce, less the amounts already paid and the amounts of the ad- justments allowed by complainant, or a total of $46,767.26.

Respondent's counterclaim failed to demonstrate that complain- ant was responsible for the destruction of respondent's business. Neither did such counterclaim establish that any amount is due from complainant to respondent on the earlier transactions re- [illegible] to in such counterclaim. We find that the counterclaim [illegible] dismissed.

SUNNYSIDE PACKING COMPANY, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7141. Decided June 12, 1986.

Admission—Reparation awarded.

Kenneth H. Vail, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $804.00 in connection with a truckload of plums in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Sunnyside Packing Company, is a corporation whose mailing address is P. O. Box 828, Selma, California 93662. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $804.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $804.00 with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

D'ARRIGO BROS. CO. OF CALIFORNIA, *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7142. Decided June 12, 1986.

Admission—Reparation.

Kenneth H. Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,576.00 in connection with two shipments of mixed produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, D'Arrigo Bros. Co. of California, is a corporation whose mailing address is P. O. Box 850, Salinas, California 93902. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $3,576.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,576.00 with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SONORA RANCHES, INC., *v.* INTER-TEX ENTERPRISES, INC., PACA Docket No. 2-7143. Decided June 12, 1986.

Admission—Reparation.

Kenneth H. Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,062.50 in connection with two truckloads of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Sonora Ranches, Inc., is a corporation whose mailing address is 9123 North Cave Creek, Phoenix, Arizona 85020. Respondent, Inter-Tex Enterprises, Inc., is a corporation whose address is 727 Ceralvo Street, San Antonio, Texas 78207. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,062.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,062.50 with interest thereon at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MERRILL FARMS, *v.* J. CARUSO PRODUCE, INC., PACA Docket No. 2–6371. Decided June 23, 1986.

F.o.b. sale—acceptance—suitable shipping condition—transportation conditions normal—damages for violation of seller's warranty—counterclaim granted.

Where all evidence showed that lettuce was not in suitable shipping condition when loaded on board van, damages awarded to buyer which accepted lettuce on arrival.

Andrew W. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of $3,004.50 in connection with one transaction, in interstate commerce, involving lettuce, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any further liability to complainant. In addition, respondent counterclaimed against respondent in the amount of $2,336.00.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) has been followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement, and respondent filed a verified answering statement. Also, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Merrill Farms, is a corporation whose mailing address is P.O. Box 659, Salinas, California 93902.

2. Respondent, J. Caruso Produce, Inc., is a corporation whose mailing address is 14 South Water Market, Chicago, Illinois 60608.

3. At all material times, each party was licensed under the Act.

4. On or about February 17, 1983, in the course of interstate commerce, complainant, by oral contract, sold to respondent 840 cartons of lettuce at an f.o.b. price of $2.75 per carton plus 65 cents per carton cooling, 15 cents per carton brokerage, and $22.50 for a

Ryan recorder, for a total agreed f.o.b. price of $3,004.50. The contract was negotiated through Fry Distributing Co., Inc., 2840 South Ashland, Chicago, Illinois 60608. The lettuce was shipped on that same date from a loading point in Arizona to respondent in Chicago on board van No. AXXZ 595754 which is owned and operated by Agricultural Express of America, 3409 West Pershing Road, Chicago, Illinois 60632. The van arrived in Chicago on Sunday, February 20, 1983, at 4:15 p.m. CST. As Monday, February 21, 1983, was observed as a legal holiday by the merchants on the South Water Market in Chicago, respondent did not open for business until 3:00 a.m. CST, February 22, 1983. At that time, it received notification of the van's arrival from the Flash Delivery Co. which had picked up the trailer from the unloading ramp of the Agricultural Express of America, and was further notified that the van would be delivered to respondent's location as soon as the South Water Market Association's rules permitted.

5. An employee of respondent was sent to check the van prior to its being delivered to respondent's loading dock. Upon arrival, the employee was advised that the refrigeration motor on the van was not running, and that the motor was out of fuel. The Flash Delivery Co. was contacted concerning this matter and advised respondent that the refrigeration unit had been operating when the van was delivered to the South Water Market Association lot at 1:00 a.m. on the morning of February 22, 1983.

6. The Ryan recording tape indicates that the instrument operated for about 108 hours. Since the bill of lading indicates that the loading was completed at 4:55 p.m. on February 17, 1983, this would indicate that the Ryan operated until about 6:00 a.m. on February 22, 1983. The tape further indicated that the temperature on board van No. AXXZ 595754 started at 75°F., quickly rose to 95°F. within the first two hours, dropped to about 42°F. two hours thereafter, dropped to 40°F. eight hours after that, and dropped to 35°F. at the end of the first 24 hour period. For the next 82 hours, the temperature was maintained in a 35°F. to 37°F. range and, for the last two hours in which the Ryan recording thermometer was operating, the temperature slowly rose to around 41°F. or 42°F. The company which supplied the Ryan recorder, Ryan Instruments, Inc., P.O. Box 599, Kirkland, Washington 98033, subsequent to this trip, recalibrated it and notified respondent as follows:

> Ryan #342656 returned to our Kirkland plant on Feb. 24, 1983. Upon testing, it was determined that the temperature sensor was reading 3 to 4° *low throughout the entire*

temperature range. The chartdrive mechanism was accurate as to time. The hinge on the outer case was cracked.

I'd like to direct your attention to the 108 hour point of chart 82361. The dark markings at this point indicate the instrument sustained an impact, apparently while being removed from the vehicle. This impact appears to be responsible for the error factor noted in our testing. In view of this, the recording prior to the point of impact is an accurate reflection of temperatures encountered on the trip. If we may be a further assistance, please advise.

7. On February 22, 1983, at 8:50 a.m. CST, the lettuce on board van No. AXXZ 595754 was inspected while still on board the van which was located in the truck lot at the South Water Market in Chicago, Illinois. The inspection certificate issued thereafter (F 010523) indicates that the temperature control unit was not operating, that respondent had unloaded approximately 150 cartons of the total 840 cartons shipped, and that the pulp temperature of the lettuce was as follows: "Near ⅔ length of trailer: Top 70°F, 3rd layer 68°F, 4th layer 88°F, floor 63°F." The inspection certificate further indicates that the condition of the lettuce was as follows:

Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper leaves only;* [sic] Serious damage by decay, in most samples 2 to 12 heads, in many none, average 17%. *Head leaves;* [sic] Decay ranges from 12 to 24 heads per cartons [sic], average 83%, Bacterial Soft Rot, in advanced stages.

8. The load of lettuce was the subject of a second Federal inspection on February 24, 1983, at 1:05 p.m. CST. The inspection certificate issued thereafter (F 010668) indicates that the lettuce was inspected while on board the van which was located in the truck lot of the South Water Market in Chicago, Illinois, and that the temperature control unit on the truck was not running. The temperature of the lettuce is recorded as follows: "Rear doors: Top 78°F, 3rd layer 63°F., 4th layer 65°F., Floor 58°F. Rear ½ length: Top 59°, 3rd layer 68°, floor 55°F. Rear ¼ length: Top 54°, 3rd layer 64°, floor 60°F." In addition, the inspection certificate notes the condition of the lettuce as follows:

Heads or portions of heads not affected by condition defects are fresh and crisp. *Wrapper leaves only:* Serious damages by decay, in most samples 2 to 16 heads, in some none, average 33%. *Head leaves:* Decay ranges from 3 to 24

heads per carton, average 57%, Bacterial Soft Rot, in advanced stages.

9. On February 24, 1983, the lettuce on board van No. AXXZ 595754 was dumped by the C. Post Disposal Service, 1439 South 58th Court, Cicero, Illinois 60650, at a cost of $300 to the respondent.

10. On February 24, 1983, the respondent sent complainant the following telegram at 1:09 p.m. EST:

> BE ADVISED AXXZ595754 ARRIVED IN DETERIORATED CONDITION PER USDA INSPECTION WE HAVE ATTEMPTED TO HAVE FUEL PUT IN REFRIGERATED UNIT WITHOUT SUCCESS. WE BELIEVE THE CONDITION OF THIS LETTUCE REQUIRES IT TO BE DUMPED AS IT HAS NO COMMERCIAL VALUE WE HAVE BEEN ATTEMPTING TO OBTAIN A DISPOSAL COMPANY TO TAKE THE LETTUCE TO DUMP BUT HAVE BEEN UNSUCCESSFUL SO FAR WE ACCEPT NO RESPONSIBILITY FOR THIS LETTUCE AND WILL HANDLE IT ONLY FOR THE ACCOUNT FOR WHOM IT CONCERNS FOR THE PURPOSE OF HAVING IT DUMPED AS SOON AS POSSIBLE FOR THE PURPOSE OF MINIMIZING THE LOSS. PLEASE BE GOVERNED ACCORDINGLY WE WILL KEEP YOU ADVISED.

11. The complainant sent the respondent the following telegram at 6:03 p.m. EST on February 24, 1983:

> RECEIPT IS ACKNOWLEDGED OF YOUR FEBRUARY 24, 1983 TELEGRAM IN REFERENCE TO VAN AXXZ 595754 SHIPPED FEBRUARY 17, 1983. PLEASE TAKE NOTICE THAT AT THIS TIME MERRILL FARMS DOES NOT CONSIDER CARUSO RELEASED FROM ITS RESPONSIBILITY OF THIS F.O.B. CONTRACT. FURTHER THE CONTRACT WILL STAY IN FORCE UNTIL DETERMINATION CAN BE FOR THE HIGH PULP TEMPERATURE AT DESTINATION. AS THIS WAS AN F.O.B. SHIPMENT ALL DOCUMENTS MUST BE RECEIVED TO DETERMINE WHERE LIABILITY SHOULD BE PLACED. UPON RECEIPT OF DOCUMENTS WE WILL REVIEW THIS MATTER SO IT CAN BE CONCLUDED PROPERLY.

12. The United States Department of Agriculture Market News Report for February 22, 1983, covering the Chicago wholesale

market indicates that the lettuce had a minimum value of $6 per carton, and that the prices were steady.

13. The formal complaint was filed on June 13, 1983, which was within nine months of when the cause of action herein accrued.

CONCLUSIONS

There is no dispute in this case about certain material facts, *viz*, that the parties entered into an agreement whereby complainant would sell respondent 840 cartons of lettuce for a total f.o.b. price of $3,004.50, that the lettuce was shipped by complainant, and that the lettuce was received and accepted by respondent. Accordingly, having accepted the lettuce, respondent became obligated to complainant for the full contract price less any provable damages. *Rocky Ford Dist. Co.* v. *Angel Produce,* 29 Agric. Dec. 93 (1970). The respondent has the burden of proof as to such matters. *The Growers-Shipper Pot. Co.* v. *Southw. Pro. Co.,* 28 Agric. Dec. 571 (1969). In this case, therefore, the respondent must prove that the complainant breached the parties' contract, and that it was damaged as a consequence thereof.

The respondent has alleged that the lettuce which complainant shipped was not of the quality called for by their contract. As this was an f.o.b. sale, the lettuce was to be placed on board the van by complainant, at the shipping point, in suitable shipping condition. 7 CFR § 46.43(i). This means that the complainant was obligated to load lettuce on board the van which would arrive at the contract destination without abnormal deterioration if the shipment was handled under normal transportation service and conditions. 7 CFR § 46.43(i). *R. C. Walter & Son* v. *Gatz,* 31 Agric. Dec. 655 (1972). Respondent has alleged that the complainant failed in this regard, and that the complainant breached its warranty of suitable shipping condition. As noted above, respondent has the burden of proof on this issue, *i.e.,* it must show that the lettuce showed abnormal deterioration upon arrival and that transportation conditions were normal. *Valley Packing Co.* v. *Nicholas J. Zerillo, Inc.,* 28 Agric. Dec. 1352 (1969). There is no dispute between the parties about whether the lettuce was abnormally deteriorated; the first Federal inspection, on February 22, 1984, makes that clear. Thus, the dispositive issue in this case is whether or not there were abnormal shipping conditions as was alleged by the complainant.

The only substantive evidence on transportation service and condition is the tape from the Ryan recording device.[1] However, the

[1] The record also contains the affidavit of complainant's salesperson who is based in California, and who claims the load was properly pre-cooled. Since the load was

Continued

efficacy of this evidence is in dispute. Respondent argues the tape proves that the temperature on board the van was normal; complainant argues that the device was damaged and it therefore proves nothing. However, substantial evidence in the record indicates that this device operated properly throughout the entire trip. There is evidence that it was damaged after having operated for 108 hours. Considering the indication, on the bill of lading, that the loading was completed on February 17, 1983, at 4:55 p.m., the Ryan device operated until about 6:00 a.m. on February 22, 1983. Since this was about the time when respondent's employees opened the van, we concluded that the damage to the device did not occur until an attempt was made to remove it from the van. Such a conclusion is consistent with that made by the Ryan Instruments, Inc., personnel who inspected the device shortly thereafter.

In view of the above, we conclude that the tape from the Ryan device properly recorded the temperature on the van. The tape showed that the temperature in the van was normal throughout the trip, *i.e.*, after the first few hours, the tape shows the temperature on board the truck to be about 36°F. This is exactly the temperature which the bill of lading required the air temperature to be.

In spite of this evidence to the contrary, complainant maintains, however, that the carrying temperature on the van was too high. However, since we conclude that the Ryan recording device was operating correctly throughout the trip, and the tape from the trip indicates that the temperatures were maintained in a proper order throughout it, we conclude that complainant's allegation is unsupported by any record evidence. The complainant is apparently relying on the result of the recalibration of the recording device subsequent to the trip to support its claim that the temperatures on the van were too high. However, Ryan Instruments, Inc., which recalibrated its device after the trip, indicated that, while at the time of the recalibration the device was recording temperatures 4°F. lower than the actual temperature, it was expected this fault was not in effect during the trip, but rather resulted from some damage which

shipped from Arizona, it is difficult to understand how this person was in a position to attest to this fact. Moreover, the evidence he points to, a sheet titled "Operator's Daily Report," which ostensibly is a report from the complainant's pre-cooler in inconclusive at best. In the worst light for complainant, the "Operator's Daily Report" supports respondent's contention that the lettuce was not properly pre-cooled since it only reflects that 600 cartons of "Merrill Farms" lettuce were cooled, while complainant shipped 840 cartons. The Ryan tape, *see* below, shows a sharp temperature rise after the lettuce was loaded. Such a rise could have occurred if complainant only pre-cooled 600 of the 840 cartons loaded on the van.

occurred in removing the device from the van at the 108 hour point. Even had the temperature range been 4°F. higher than was reported on the Ryan tape, this temperature of about 40°F. would not have been the primary cause for the pulp temperature of the lettuce to rise to a temperature range of 63°F. to 88°F. as is reflected on the first Federal inspection certificate issued on February 22, 1983. Even had the cooling device not been properly functioning for several hours before the lettuce was inspected, since the temperature in mid-February in Chicago is not likely to be very high, such a failure would not account for the high temperature of the lettuce (63°F–88°F) reflected at 8:50 a.m., February 22, 1983, federal inspection. On the basis of all of the evidence in the record, we find that there were no abnormal shipping conditions in effect during the trip. *James Macchiaroli Fruit Co.* v. *Thos. Caito Sons,* 21 Agric. Dec. 525 (1962).

Since we have found that there were no abnormal shipping conditions, the complainant's warranty of suitable shipping conditions is maintained in effect. Inasmuch as the condition of the lettuce upon arrival was so poor as to indicate that the lettuce which complainant loaded in the van was in unsuitable shipping condition, we must hold that complainant breached its contract with respondent. As a result thereof, respondent is entitled to damages. The measure of damages for breach of warranty as to accepted goods is the difference at the time and place of delivery between the value of the goods delivered and the value they would have had if they had been as warranted, together with incidental damages. U.C.C. section 2-714; *Ritepak Produce* v. *Green Grove Markets,* 29 Agric. Dec. 165 (1970). We may accept the market news price for lettuce on the date of delivery as the value of the lettuce if delivered as warranted. *Anaya Farms* v. *Produce Distributors,* 20 Agric. Dec. 58 (1961). That price was $6.00 per carton, or a total of $5,040.00 for the 840 cartons. The goods delivered, in the instant case, had no value inasmuch as the whole lot of lettuce had to be dumped. Respondent's damage is thus $5,040.00. The contract price for the 840 cartons of lettuce was $3,004.50. Respondent is thus due $2,035.50 ($5,040.00 less $3,004.50) plus the $300 cost of dumping the lettuce, or $2,335.50, from the complainant. Complainant's failure to pay respondent this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days of the date of this order, complainant shall pay respondent $2,335.50, as reparation, with interest thereon at the rate of 13 percent per annum from April 1, 1983, until paid.

Copies of this order shall be served upon the parties.

THOMAS G. VALENZUELA d/b/a T. G. VALENZUELA PRODUCE, *v.* TEDDY BERTUCA d/b/a TEDDY BERTUCA COMPANY, PACA Docket No. 2-6710. Decided June 23, 1986.

Consignment—breach of duty by respondent consignee—reparation awarded.

Where respondent accepted seven lots of cantaloupes on consignment from complainant, he breached his duty as a consignee by failing to provide accounts of sale and remit the net proceeds of the sales. Respondent's liability does not extend to loads where the evidence supports his claim that the cantaloupes were in very poor condition upon arrival at his place of business.

Andrew N. Stanton, Presiding Officer.
Complainant, *pro se.*
Barry Kirschner, Esquire, Tucson, AZ, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $26,178.19 in connection with the consignment of seven lots of cantaloupes to respondent in interstate and foreign commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent subsequently amended its answer and asserted a counterclaim in the amount of $6,321.39 in connection with the subject matter of the complaint. Complainant filed a reply, denying liability.

The amount claimed as damages exceeds $15,000.00 and respondent requested an oral hearing. Therefore, an oral hearing took place in Tuscon, Arizona, on November 19, 1985. At the hearing, only respondent was represented by legal counsel, as complainant elected to proceed without counsel. Three witnesses testified for complainant and six witnesses testified for respondent. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Thomas G. Valenzuela, d/b/a T. G. Valenzuela Produce, is an individual whose address is P.O. Box 2280, Nogales, Arizona. At the times of the transactions alleged in the counterclaim, complainant was licensed under the Act.

2. Teddy Bertuca d/b/a Teddy Bertuca Produce, is an individual whose address is P.O. Box 2896, Nogales, Arizona. At the times of the transactions alleged in the complaint, respondent was licensed under the Act.

3. On approximately January 22, 25, 28, 30, and 31, 1984, complainant, by oral contract, consigned to respondent seven loads of cantaloupes consisting of sizes 15, 18, 23, 30, 36 and 42. The contract provided that respondent was to receive a 10% commission after sale. Respondent also gave complainant a $20,000.00 cash advance.

4. The cantaloupes comprising the seven loads were shipped from Mazatlan, Sinaloa, Mexico, to the Mexican/American border on January 20, 1984 (hereinafter "transaction 1"), January 22, 1984 (hereinafter "transaction 2"), January 25, 1984 (hereinafter "transaction 3"), January 26, 1984 (hereinafter "transaction 4"), January 28, 1984 (hereinafter "transaction 5"), January 28, 1984 (hereinafter "transaction 6"), and January 29, 1984 (hereinafter "transaction 7"). Upon their arrival at the border, four of the loads were subjected to a federal inspection. Transaction 3 was inspected on January 28, 1984, and found to contain "1136 half crate . . . defects 22 to 50%, average 35%, including from 11 to 39%, average 26% decay. Pulp temperature 60 F." Transaction 5 was inspected on January 30, 1984, and found to contain "1088 half crate . . . defects 13 to 39%, average 22%, including 9 to 39%, average 19% decay. Pulp temperature 45 F." Transaction 6 was inspected on January 30, 1984, and found to contain "598 half crate . . . defects 4 to 22%, average 14%, including from 4 to 22%, average 11% decay. Pulp temperature 48 F." Transaction 7 was inspected on January 31, 1984, and found to contain "992 half crate . . . defects 11 to 28%, average 16%, including 3% bruises, 3% sunburn, 3% scars and in most samples none, in many from 6 to 11% average 3% decay. Pulp temperature 40 F."

5. The cantaloupes arrived at respondent's place of business, and were found to contain the following numbers of crates for each size of cantaloupe:

Date Received	Transaction No.	15's	18's	23's	30's	36's	42's	Total
1/22/84	1	0	78	285	64	120	1	548
1/25/84	2	0	113	564	96	218	0	991
1/28/84	3	0	203	671	87	175	0	1136
1/28/84	4	32	224	633	57	187	0	1133
1/30/84	5	0	0	597	0	0	0	597
1/30/84	6	24	367	356	60	281	0	1088
1/31/84	7	0	252	546	15	169	0	982

6. Respondent accepted the cantaloupes for handling on consignment and disposed of them, but never provided complainant with accounts of sale or returns from the sale of the consigned cantaloupes.

7. A formal complaint was filed on August 22, 1984, which was within nine months from when the causes of action herein accrued. A counterclaim was filed on June 5, 1985, in connection with the subject matter of the complaint.

CONCLUSIONS

The complaint concerns seven loads of cantaloupes which respondent agreed to handle on consignment for complainant's account. Complainant complains that he never received any accounts of sale or notice of problems, and has not been paid anything by respondent. It is respondent's position that the cantaloupes were defective and difficult to sell. Respondent contends that his net proceeds were less than the $20,000.00 it advanced to complainant and has filed a counterclaim for the difference.

Since respondent was handling the cantaloupes on consignment, he was obliged to adhere to the requirements of section 46.29(a) of the Department's regulations (7 CFR § 46.29(a)), which states as follows, in pertinent part:

> It is a violation of section 2 of the Act to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the Act, due to his negligence or failure to perform any specification or duty, ex-

press or implied, arising out of any transaction subject to the Act.

Complainant, as the party alleging that respondent was in breach of duty as a consignee, has the burden of proving his allegations by a preponderance of the evidence. *John Livacich Produce, Inc. a/t/a Vista Sales* v. *Auster Company, Inc.*, 42 Agric. Dec. 657 (1983).

Complainant bases his case on a report of personal investigation prepared by two Department of Agriculture investigators, which is in evidence in this proceeding. The report states that between May 10 and 16, 1984, the investigators examined respondent's records, and found that he had received 6,475 crates of cantaloupes from complainant. The investigators found that respondent had prepared recaps of sale for each load, but discovered that respondent's records of sales did not fully support his recaps. The investigators prepared an audit accounting, accepting only those sales supported by respondent's records. Where the sales evidenced by the records differed from the sales set forth in respondent's recap, the investigators raised or lowered the total number of crates to correspond with the quantity received by adding or subtracting crates at the average sales price for the crates for which there existed evidence of sales. The investigators reviewed all adjustments and credit memos to determine whether there was justification for any allowances granted. Adjustments granted due to condition problems were not allowed unless supporting evidence was found. All prices at less than one dollar per crate which respondent claimed to have ived were eliminated.

That inspection (respondent's exhibit 22) revealed an average of 26% decay and a pulp temperature of 60°F. (Finding of Fact 4). Mr. Mandel also testified to an inspection that allegedly occurred at the border on transaction 4, but the inspection report upon which he based his testimony, respondent's exhibit 23, on close examination is merely a photocopy of respondent's exhibit 22, the inspection pertaining to transaction 3. Mr. Mandel testified concerning inspections of transaction 5, which found an average of 11% decay and a pulp temperature of 48°F., and transaction 6, showing an average of 19% decay and a 45°F. pulp temperature (Finding of Fact 4). These three inspection reports clearly indicate that the cantaloupes were severely decayed at the border. Transaction 7 was inspected at the border on January 30, 1984, which found a total of 16% damage including 3% decay, with a pulp temperature of 40°F. (Finding of Fact 4). Mr. Mandel explained (transcript at 172-173) that this inspection was much more restricted than the other border inspections and, therefore, the actual decay experienced by the load was much greater than that revealed by the inspection. However, there is nothing in the record to support this claim and we, therefore, will accept the inspection at face value.

The inspection reports provided to the Department after the investigators prepared their audit accounting establish that the cantaloupes in transactions 3, 5 and 6 were in extremely poor condition before respondent ever received them. We ordinarily consider the findings of the Department's investigators to be extremely strong evidence. However, the investigators were not shown any inspection reports by respondent at the time of their investigation. We are sure that the investigators would have taken these reports into account if they had been informed of their existence. Accordingly, we have considered these reports in our evaluation of the reasonableness of respondent's returns, and made appropriate adjustments in the audit accounting. The remaining transactions do not affect the audit accounting, as there is no evidence of border inspections of transactions 1, 2 and 4, and the inspection of transaction 7 does not show sufficient deterioration to warrant any alteration of the conclusions of the Department's investigators.

Respondent has also placed into evidence federal inspections allegedly taken at the places of business of respondent's customers. None of these inspections will be given any significant weight. Respondent's Mr. Mandel testified (transcript at 141) that with respect to transaction 2, a January 26, 1984, inspection was taken on 84 crates of melons at the place of business of Buttke-Klahr, Inc., Phoenix, Arizona, one of respondent's purchasers. However, respondent's returns from the sales to Buttke-Klahr, Inc., $1.80 per

crate for 42 crates of 18's and 42 crates of 23's, were accepted by the Department's investigators and are not disputed by complainant. Mr. Mandel testified (transcript at 163–164) that a February 2, 1984, inspection of 966 crates of melons at West Coast Produce Co., Inc., San Antonio, Texas (respondent's exhibit 20) which showed decay, covered melons from transaction 5. However, the February 2, 1984, inspection was of both 23's and 18's, and transaction 5 contained only 597 crates of 23's. Therefore, even assuming the 966 crates inspected included the 597 crates of transaction 5, we cannot determine from the inspection the degree of deterioration exhibited by the melons from transaction 5 alone. With respect to the February 2, 1984, inspection of 79 crates at Solari-Aliaga Co., San Francisco, California (respondent's exhibit 18), which Mr. Mandel testified covered melons from transaction 6 (transcript at 162), it is not necessary to subject that inspection to any substantial analysis, as it is evident from the border inspection of transaction 6 that the cantaloupes were in such poor condition that any reasonable disposition by respondent would be consistent with his broker's duty. With regard to the February 6, 1984, inspection taken at Serra Brothers Inc., Detroit, Michigan, Mr. Mandel claims that such inspection covered melons from transactions 3 through 7 (transcript at 163). We believe this inspection to be unnecessary to justify respondent's handling of cantaloupes from transactions 3 and 6, as the border inspections show they were substantially decayed before they arrived at respondent's place of business. We do not believe the February 6, 1984, inspection should be given any significant weight regarding transactions 4, 5 and 7 for several reasons. First, the identity of the cantaloupes inspected is called into question by the fact that the inspection covered 335 crates, and respondent's recaps of sales show that respondent received only 314 crates. In addition, the date of the inspection, February 6, 1984, is nine days after delivery of transaction 4 on January 28, 1984, eight days after delivery of transaction 5 on January 29, 1984, and seven days after delivery of transaction 7 on January 30, 1984. These time periods

We have not found any significant evidence of problems regarding transactions 1, 2, 4 and 7. We, therefore, accept the findings of the audit accounting as representing what respondent should have remitted to complainant for these transactions. However, we have concluded that the cantaloupes from transactions 3, 5, and 6 were in very poor condition upon arrival at respondent's place of business and we thus will analyze the audit accounting with this in mind.

The audit accounting for transaction 3 did not accept respondent's claim that eight crates of 18's and 164 crates of 23's were sold to Serra Brothers, Inc., for $.75 each, or $129.00; 42 crates of 23's, 72 crates of 30's, and 175 crates of 36's were sold to Solari-Aliaga for $.50 per crate, or $144.50; and 420 crates of 23's were sold to W. W. Rogers for $.75 per crate, or $315.00. The audit also did not accept respondent's claim that one crate of 23's was lost to General Produce on repacking and one was given to W. Fay as a sample. In view of the obvious poor condition of the melons from transaction 3, we accept all these claims as valid except for the one crate given as a sample, which is not associated with condition problems. For transaction 5, the audit accounting did not accept respondent's claim that he had to pay $.015 per crate on 547 crates of 23's sold to West Coast Produce, for a charge of $8.20, and received $.75 per crate for 41 crates sold to Serra Brothers Inc. for $30.75. While we accept respondent's returns of $30.75 for the crates sold to Serra Brothers, Inc., we cannot accept that the 547 cartons sold to West Coast Produce were completely without value. It is stated in section 46.22 of the Department's regulations (7 CFR § 46.22) that a dump certificate or other adequate evidence must be provided to prove that produce is without commercial value when more than 5% of a consigned load is dumped. While the January 30, 1984, border inspection shows that transaction 5 experienced severe condition problems, the degree of deterioration, 11% decay, was not so great to permit a conclusion that virtually the entire load of 597 cartons was completely without commercial value. Since the melons of transaction 6 were so greaty decayed at the border, we will accept respondent's returns for the sale to W. W. Rogers of two crates of 18's at $.75 per crate, or $1.50, 84 crates of 18's, 138 crates of 23's, 31 crates of 30's and 65 crates of 36's to Solari-Aliaga at $.50 per crate, or $159.00, and 24 crates of 15's and 5 crates of 23's to Serra Brothers, Inc., for $.75 per crate, or $21.75. Respondent also claims that he incurred a loss of $.015 per crate for 239 crates sold to West Coast Produce, for an indebtedness of $3.59, and had to dump an additional 64 crates of 23's and 55 crates of 36's. We will accept the returns alleged in transaction 6 from sales to Solari-

Aliaga and Serra Brothers, Inc. We will also accept the dumping in this load, as we believe the results of the border inspection, an average of 19% decay, are consistent with respondent's claim that 358 of the 1,088 crates in transaction 6 were completely without value. We will not allow respondent a claim of $3.59 for the 239 crates sold to West Coast Produce in the absence of any evidence explaining such a charge.

It is our conclusion that the audit account of sales prepared by the Department's investigators, as revised in accordance with the above analysis, is an accurate reflection of the obligations of the parties with respect to the seven loads of cantaloupes at issue. The audit account of sales found justification for the sale of only 22 crates of 15's for $374.00, with 34 crates unaccounted for. As we have accepted the $18.00 reported by respondent for the sale of 24 crates in transaction 6, we find that 46 crates sold for $392.00. This gives an average sales price of 8.5217391 for the ten remaining crates, or $85.22, for a total of $477.20. Regarding the 18's, the audit account of sales found sales of 657 crates for $9,173.54, but could not account for 580 crates. We have accepted respondent's claim that eight crates were sold for $6.00 in transaction 3, and that 239 crates were dumped and 86 crates sold for $43.50 in transaction 6. We thus find that 990 crates of 18's sold for $9,223.24. This gives an average sales price of $9.31640 for the 247 remaining crates, or $2,301.15, for a total of $11,524.39. Regarding the 23's, the audit account of sales found sales of 1,685 crates for $19,855.09, but could not account for 1,967 crates. We have accepted respondent's claims that in transaction 3, one crate was dumped, and 627 sold for $429.00; in transaction 5, 41 crates were sold for $20.75; and in transaction 6, 200 crates were sold for $72.75. We thus find that 2,560 crates sold for $20,417.59. This gives an average sales price of $7.975621 for the 1,092 remaining crates, or $8,709.38, for a total of $29,126.97. Concerning the 30's, the audit account of sales showed 358 crates sold for $3,535.50, but it could not account for 21 crates. It is not clear how the Department's investigators determined that only 21 crates were not accounted for, since the record indicates that 103 crates were reported sold at less than $1.00 per crate, which the investigators indicated they would not accept. We have accepted the validity of respondent's claims that in transaction 3, 72 crates sold for $36.00, and in transaction 6, 31 crates sold for $15.50, for a total of $51.50 for the 103 crates. Therefore, in order to determine what value to assign to the 21 crates, we will use the average sales price respondent obtained for the 103 crates of $.50 per crate, or $10.50. We thus find that the 379 crates of 30's sold for $3,535.50 plus $10.50, or $3,546.00. Regarding the 36's, the audit

account of sales accepted sales of only 446 crates for $2,500.60, but could not account for 704 crates. We have accepted respondent's claims that for transaction 3, 175 crates sold for $87.50 and for transaction 6, 55 crates were dumped while 65 crates sold for $32.50. We thus find that 741 crates sold for $2,628.60. This gives an average sales price of $3.5473684 for the 409 remaining crates, or $1,450.87, for a total of $4,079.47. There is no dispute over the $1.50 reported for the one crate of 42's. The revised audit accounting for all sizes of cantaloupes in the seven loads is thus $477.22 for the 15's, $11,524.39 for the 18's, $29,126.97 for the 23's, $3,546.00 for the 30's, $4,079.47 for the 36's, and $1.50 for the 42's, for total gross proceeds of $48,755.55. The Department's investigators allowed adjustments of $2,639.82, which leaves $46,115.73 as the adjusted gross proceeds. The investigators also found $15,768.80 in allowable expenses, which also should be deducted. In addition we must subtract a commission of 10% of the adjusted gross proceeds, or $4,611.57, which leaves net proceeds of $25,735.36. After deducting respondent's advance to complainant of $20,000.00 we are left with $5,735.36 as the net proceeds underreported and unpaid to complainant. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Respondent has filed a counterclaim which is based on the premise that the investigators' report was in error with respect to the seven transactions at issue, since all loads were in poor condition when they reached respondent. As we have determined, this is only the case with respect to transactions 3, 5 and 6 but not with respect to transactions 1, 2, 4 and 7. Therefore, respondent's counterclaim is dismissed.

Complainant is the prevailing party herein and is entitled to an award of fees and expenses in accordance with section 7(a) of the Act (7 U.S.C. § 499g(a)). Complainant has filed a claim for $1,650.00 to which respondent has objected. Complainant's claim consists of $900.00 for three trips to the Los Angeles, California, P.A.C.A. office, $600.00 for one trip to the Washington, D.C. P.A.C.A. office, and $150.00 for miscellaneous expenses. This claim will not be granted, as complainant has not shown that these expenses were "necessarily incurred in connection with the oral hearing." 7 CFR § 47.19(d)(2)(v). Further, complainant has not presented any receipts to support his claim.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,735.36, with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

F & J PRODUCE SALES, *v.* HDRLICKA DAIRY CATTLE INC., a/t/a HRDLICKA BROS. PRODUCE CO., PACA Docket No. 2-6900. Decided June 23, 1986.

Counterclaim not timely filed.

Respondent's counterclaim was found not to be derived from the subject matter of the complaint and, therefore, was not timely filed. Respondent has offered no other defense to the complaint and is thus liable for the amount alleged by complainant.

Andrew N. Stanton, Presiding Officer.
Charles M. Sanders, Tampa, FL, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award of $11,125.52, which has since been amended to $10,459.46, in connection with the sale and shipment of three truckloads of watermelons to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent also filed a counterclaim and set-off in the amount of $13,230.47. Complainant filed a reply, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Respondent submitted an answer-

ing statement and complainant submitted a statement in reply. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, F & J Produce Sales, is a corporation whose address is P.O. Box 545, Lake Hamilton, Florida. At the time of the transaction involved in the counterclaim, complainant was licensed under the Act.

2. Respondent, Hrdlicka Dairy Cattle Inc., a/t/a/ Hrdlicka Bros. Produce Co., is a corporation whose address is Route 7, Box 142, Chippewa Falls, Wisconsin. At the times of the transactions involved in the complaint, respondent was licensed under the Act.

3. On June 5, 1984, complainant sold to respondent a truckload of watermelons at $5.00 per hundredweight, f.o.b., consisting of 43,280 pounds, for a total of $2,164.00. Complainant prepared an invoice (number 2017) containing this information and sent it to respondent, who never objected to the fact that the invoice purported to represent one distinct transaction.

4. The June 5, 1984, truckload was shipped in interstate commerce to respondent, where it arrived on June 8, 1984. Upon arrival, only 43,060 pounds of melons were accepted by respondent. Respondent has failed to pay complainant any part of the contract price for this truckload.

5. On June 21, 1984, complainant sold to respondent two truckloads of watermelons at $9.15 per hundredweight, delivered, consisting of 50,910 pounds and 47,030 pounds, for contract prices of $4,658.27 and $4,303.25, respectively. Complainant prepared invoices H120 for the 50,910 pound load and H121 for the 47,030 pound load, reflecting the contract terms, and sent them to respondent, who never objected to the fact that they purported to represent distinct transactions.

6. The June 21, 1984, truckload represented by invoice H120 was shipped in interstate commerce to respondent. When it arrived on June 23, 1984, respondent paid an unloading fee of $100.00 and accepted 46,398 pounds. Respondent has failed to pay complainant any part of the contract price for this truckload.

7. The June 21, 1984, truckload represented by invoice H121 was shipped in interstate commerce to respondent. When it arrived on June 25, 1984, respondent paid an unloading fee of $50.00 and accepted 45,910 pounds. Respondent has failed to pay complainant any part of the contract price for this truckload.

8. An informal complaint was filed on February 11, 1985, which was within nine months from when the causes of action alleged in the complaint accrued.

9. Respondent filed a counterclaim and set-off on June 24, 1985, which did not involve the transactions alleged in the complaint. The counterclaim was filed in excess of nine months from when the cause of action therein accrued.

CONCLUSIONS

In this complaint, complainant alleges that respondent is liable for the unpaid purchase price of three loads of watermelons sold to respondent in the amount of $11,125.52. Complainant has since amended its complaint to $10,459.46, taking into consideration the weight of the watermelons accepted by respondent and deducting the unloading fees charged respondent for the June 21, 1984, loads. Respondent admits purchasing, receiving and accepting these three loads, but claims that they were installments of one purchase made on June 5, 1984. Respondent alleges in its counterclaim and set-off that on June 5, 1984, it ordered three loads of watermelons scheduled for shipment on June 5, June 12, and June 21, 1984, and that complainant's improper handling of the June 12, 1984, load caused respondent to incur a substantial loss.

Respondent's counterclaim and set-off were filed along with its answer on June 24, 1985. Complainant claims that the counterclaim is not timely, as it was filed more than nine months after the alleged cause of action accrued in June 1984. Counterclaims not based on the subject matter of a complaint must be filed within nine months from when the causes of action thereof accrued. 7 CFR 47.3(a); *Bianchi & Sons Packing Co.* v. *Kelvin S. Ng d/b/a Kin Yip Company*, 42 Agric. Dec. 292 (1983). It is apparently respondent's position that the June 12 load and the three loads alleged in the complaint, were all part of one transaction entered into on June 5, 1984. Therefore, according to respondent, its counterclaim was based on the subject matter of the complaint, and thus within the Department's jurisdiction. However, the only evidence offered by respondent to support this is a sworn statement by Joseph Hrdlicka, its president, which is directly refuted by an affidavit from complainant's agent, R. W. Snyder, who insists that the complaint concerns three separate purchases; one made on June 5, 1984, and two others on June 21, 1984. The report of investigation contains copies of three invoices relating to the loads alleged in the complaint which appear to represent three distinct transactions. Respondent received these invoices, as they state thereon "reinvoice 10 JAN. 85", which implies that respondent was sent them on two occasions. In addition, respondent has included in its answering statement a copy of complainant's invoice for the June 5, 1984, shipment. Respondent does not deny having received these in-

voices, or allege that it objected to their representation of the watermelon loads as distinct transactions. Therefore, we conclude that the invoices accurately reflect the agreement between the parties that the three loads of watermelons set forth in the complaint were sold to respondent in three distinct transactions, and that the June 12, 1984, transaction alleged in the counterclaim was not one of these three transactions. As the counterclaim was not filed until June 24, 1985, in excess of nine months from when the alleged cause of action therein accrued in June 1984, the counterclaim is not within the Department's jurisdiction and must be dismissed.

Other than the allegations of this counterclaim, respondent has offered no defense to complainant's amended claims for the transaction of June 5, 1984, and the two transactions of June 21, 1984, in the amount of $10,459.46. Respondent is, therefore, liable for this sum, and its failure to make payment is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $10,459.46, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

The counterclaim and set-off is hereby dismissed.

Copies of this order shall be served upon the parties.

CRISP COUNTY VEGETABLE PACKERS, INC., v. DIAMOND-T PRODUCE CORP., PACA Docket No. 2-6631. Decided June 23, 1986.

Evidence—failure to submit sworn statement with knowledge of facts—payment allegations not rebutted—accounting for produce billed on an open basis deemed adequate—complaint dismissed.

Complainant claimed that respondent failed to pay in full for 12 shipments of produce. Respondent adequately demonstrated that payment had been made or was not due as to each of the shipments. Complainant failed to submit evidence by a party with knowledge of the facts and failed to otherwise adequately rebut respondent's allegations.

George M. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $22,294.62 in connection with the shipment in interstate commerce of numerous trucklots of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant in part, and admitting liability in connection with some of the transactions in the total amount of $5,583.62.

Although the amount claimed in the formal complaint exceeds $15,000, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Crisp County Vegetable Packers, Inc., is a corporation whose address is P.O. Box 352, Cordele, Georgia.

2. Respondent, Diamond-T Produce Corp., is a corporation whose address is P.O. Box 308, Pompano Beach, Florida. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about June 15, 1983, complainant sold to respondent, and shipped to respondent's customer, 78 cartons of small cucumbers at $6.65, and 752 cartons of super cucumbers at $8.25, or a total price of $6,722.70 f.o.b. Complainant billed respondent for this amount by its invoice number 624 dated June 22, 1983. Respondent has paid complainant $4,723.70 as an undisputed amount on this invoice.

4. On or about June 22, 1983, complainant sold to respondent, and shipped to respondent's customer, 850 cartons of super cucumbers at $5.00, or a total price of $4,250.00 f.o.b. Complainant billed respondent for this amount by its invoice number 810 dated June 22, 1983. This load was rejected by respondent on arrival, and such rejection was acquiesced in by complainant. Respondent does not owe any balance to complainant on this load.

5. On or about July 2, 1983, complainant sold to respondent, and shipped to respondent's customer, 200 cartons of super cucumbers at $6.25, or a total price of $1,250.00 f.o.b. Complainant billed respondent for this amount by its invoice number 821 dated July 2, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

6. On or about July 18, 1983, complainant sold to respondent, and shipped to respondent's customer, 200 cartons of medium Vidalia onions in 50 pound containers at $4.25, or a total price of $850.00 f.o.b. Complainant billed respondent for this amount by its invoice number 791 dated July 18, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

7. On or about July 25, 1983, complainant sold and shipped to respondent 296 cartons of fancy eggplants at $5.50; 9 containers of yellow squash at $8.50; 16 containers of zucchini squash at $4.00; and 8 containers of No. 2 yellow squash at $4.00; or a total of $1,800.50 f.o.b. Complainant billed respondent for this amount by its invoice number 794 on July 25, 1983. Respondent paid complainant in full for this load by check number 01251 on December 2, 1983.

8. On or about July 27, 1983, complainant sold and shipped to respondent 350 cartons of fancy eggplants at $5.00, or a total price of $1,750.00 f.o.b. Complainant billed respondent for this amount by its invoice number 797 dated July 27, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

9. On or about July 28, 1983, complainant sold and shipped to respondent, 350 cartons fancy eggplants at $4.00, or a total price of $1,400.00 f.o.b. Complainant billed respondent for this amount by its invoice number 808 dated July 29, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

10. On or about August 5, 1983, complainant sold and shipped to respondent 120 cartons of fancy eggplants at $2.00, or a total price of $240.00 f.o.b. Complainant billed respondent for this amount by its invoice number 813 dated August 18, 1983. Respondent paid

complainant in full for this load by its check number 01251 on December 2, 1983.

11. On or about August 10, 1983, complainant sold and shipped to respondent 25 cartons of fancy eggplants at $3.75, and 40 cartons of choice eggplants at $2.75, for a total price of $203.75 f.o.b. Complainant billed respondent for this amount by its invoice number 814 dated August 18, 1983. Respondent paid complainant in full for this load by its check number 01251 on December 2, 1983.

12. On or about November 24, 1983, complainant sold to respondent and shipped to respondent's customer, 158 cartons of super cucumbers; 77 cartons of select cucumbers; 188 cartons of fancy eggplants; and 55 cartons of small cucumbers; all on an open basis. Complainant billed respondent for this produce on an open basis by its invoice number 907 dated November 30, 1983. Respondent accounted to complainant for this load by showing total returns of $929.47, from which it deducted $119.50 commission, and $761.30 for freight, leaving a balance of $48.67 which it paid to complainant as an undisputed amount.

13. On or about November 30, 1983, complainant sold to respondent, and shipped to respondent's customer, 99 cartons of super cucumbers at $4.75, or a total of $470.25 delivered. Complainant billed respondent for this amount by its invoice number 908 on December 1, 1983. Respondent paid complainant in full for this load as an undisputed amount.

14. In connection with the shipment of a load of cucumbers by complainant to respondent on June 15, 1983, respondent secured complainant's permission to deduct $786.00 when making payment. However, respondent deducted the $786.00 amount twice. Respondent admitted making the double deduction, and has paid complainant the balance due as an undisputed amount.

15. The formal complaint was filed on February 24, 1984, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant's informal complaint concerns 12 invoices for product shipped between June 15, 1983, and September 29, 1983, having a total alleged value of $20,580.40. When complainant filed its formal complaint seven of the invoices which constituted part of the informal complaint were dropped, three were added, and nine remained the same. The formal complaint claimed a total of $22,294.62. However the transactions exclusive of the open invoice (see Finding of Fact 12) totalled only $19,723.20. Apparently complainant was claiming that the open invoice had a value of

$2,571.42. However, nowhere did complainant state how this figure was arrived at.

Complainant's formal complaint was subscribed and sworn to by H.E. Reynalds who signed himself as "Director" of complainant corporation. Respondent asserted in its answering statement that H.E. Reynalds was at no time involved in any of the negotiations or transactions between complainant and respondent, and that instead complainant was always represented by a Mr. James Oglesby. Complainant made no reply to this allegation, nor to any of respondent's other allegations in the answer or answering statement. Thus we are faced with a record which contains a sworn answer and a sworn answering statement by Glen C. Thomason, president of respondent, who claims to have been involved in all of the transactions, and no sworn statement by Mr. James Oglesby whom complainant apparently admits to have been the party that always represented complainant in the subject transactions.

In its sworn answer, respondent admitted liability to complainant in connection with several of the transactions, and subsequently paid complainant for these admitted amounts pursuant to an order of this Department. As to seven of the invoices (those covered by Findings of Fact 5 through 11) respondent claims that payment was made in full to complainant by its check number 01251 dated December 2, 1983. The copy of this check which was submitted as evidence in this proceeding shows that such check was in an amount more than adequate to cover the invoices which were the subject of Findings of Fact 5 through 11, and also shows that such invoices were specifically referenced on the face of the check. Since complainant has made no reply to respondent's allegation we have concluded that each of these invoices has been paid in full.

In regard to Finding of Fact 3 it is clear that respondent has paid complainant a balance of $4,723.70 after deducting a total of $1,999.00 for freight, storage, brokerage, and USDA inspections incurred in connection, not with invoice no. 624, but with invoice 810 which is covered by Finding of Fact 4. Respondent demonstrated that invoice 810 covered a load of cucumbers which was rejected by respondent on arrival. Respondent contends that the rejection was justified as shown by an USDA inspection, and that following rejection Mr. Oglesby asked respondent to help complainant place the load. Respondent maintains that it was unable to place the load, and that the original consignee, C.H. Robinson, in Dallas, Texas, stored the produce and subsequently dumped it. C.H. Robinson Co. charged back to respondent the storage fees, inspection fees, and freight charges. In addition to the invoice number 810 to respondent covering this load, the record also contains complainant's in-

voice number 683 to C.H. Robinson covering the same identical load of cucumbers. We conclude that respondent does not owe complainant any balance in connection with the produce covered by Finding of Fact 3 or Finding of Fact 4.

In connection with the produce covered by Finding of Fact 12, and complainant's invoice number 907, both parties agree that the produce covered by such invoice was billed on an open basis. Complainant did not submit any evidence concerning the fair market value of this produce. Although the accounting data which respondent has submitted in this proceeding in connection with this invoice is inadequate in that it does not give a per package breakdown of the gross sales of the produce, in view of complainant's failure to submit evidence of the fair market value of the produce, and in view of complainant's failure to respond to respondent's allegations, we find that respondent owes complainant no further balance in regard to this invoice.

In regard to the produce covered by Findings of Fact 13 and 14 respondent has admitted owing the amounts claimed by complainant, and has made payment in full pursuant to our order for payment of the undisputed amount.

We find that there is no balance remaining due by respondent to complainant on any of the produce covered by the complaint. Consequently, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

C.B. DISTRIBUTING CO., *v.* FRESHVILLE PRODUCE DISTRIBUTING, INC., PACA Docket No. 2-7149. Decided June 24, 1986.

of payment arrangement disputed.

Louis C. Pulvermacher, [illegible] Beach, CA, for complainant.

Louis C. Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $35,815.20 in con-

nection with shipments of melons in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant, except that respondent claimed the amount it owed to complainant was $30,592.20. Respondent further stated in its answer that payment arrangements had been made. Complainant was given an opportunity to dispute the fact that payment arrangements had been made and that the amount owed to it by respondent was $30,592.20. By letter dated May 13, 1986, and received by the department on May 15, 1986, complainant agreed that the amount owed to it was $30,592.20, but denied that payment arrangements had been made. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, A.T.B. Distributing Co., is a corporation whose address is P. O. Box 2683, Turlock, California 95381. Respondent, Freshville Produce Distributing, Inc., is a corporation whose address is 1367 Viele Avenue, Bronx, New York 10474. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $30,592.20. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $30,592.20, with interest thereon at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon with the parties.

O&E GROWERS, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC., PACA Docket No. 2-7150. Decided June 24, 1986.

Liability admitted—payment arrangement claimed—disputed—Reparation.

Kenneth Vail, Presiding Officer.
Complainant, *pro se.*
Louis C. Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $23,852.25 in connection with shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Respondent further indicated in its answer that payment arrangements were being made with the complainant. Complainant was given until May 22, 1986, to dispute the fact that payment arrangements had been made. Complainant, in a letter dated May 12, 1986, and received by the Department on May 16, 1986, denied that any agreement as to payment arrangements had been made. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, O&E Growers, Inc., is a corporation whose address is P. O. Box 215, Elba, New York 14058. Respondent, Freshville Produce Distributors, Inc., is a corporation whose address is 1367 Viele Street, Bronx, New York 10474. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $23,852.25. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $23,852.25, with interest thereon at the rate of 13 percent per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

WATSONVILLE PRODUCE, INC., *v.* WEINSTEIN PRODUCE SALES, INC., PACA Docket No. 2-7164. Decided June 24, 1986.

Admitted debt—Reparation.

Kenneth Vail, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $5,727.65 in connection with two shipments of mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.9(d)).

Complainant, Watsonville Produce, Inc., is a corporation whose address is 38 Bluff Road, Watsonville, California 95076. Respondent, Weinstein Produce Sales, Inc., is a corporation whose address is P. O. Box 7364, Boise, Idaho 83707. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $5,727.65. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,727.65, with interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

AGRI-PAK FRUIT CO., *v.* NICHO PRODUCE CO., INC., and/or SO. CENTRAL BROKERAGE, INC., PACA Docket No. 2-6723. Decided June 27, 1986.

Wrongful rejection—damages—duty of broker—reparation awarded.

Where truck arrived two days late and with high temperature, buyer in f.o.b. transaction did not have right to reject load of grapes. Complainant fails to prove that broker did not carry out his duties.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondents in the amount of $2,682.00 in connection with a transaction, in interstate commerce, involving grapes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on all parties. Each respondent also was served a copy of the complaint, and each filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. Complainant filed an opening statement, respondent So. Central Brokerage, Inc., filed an answering statement, and complainant also filed a statement in reply. In addition, respondent So. Central Brokerage, Inc., filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Don Davies, Charles Enoch, Dennis Vartan, and Lee Yeramian, doing business as Agri-Pak Food Company, whose mailing address is P.O. Box 399, Del Rey, California 93616.

2. Respondent Nicho Produce Co., Inc. ("Nicho") is a corporation whose mailing address is P.O. Box 1136, Edinburg, Texas 78539.

3. Respondent So. Central Brokerage, Inc., ("So. Central") is a corporation whose mailing address is 1500 South Zarzamora Street, San Antonio, Texas 78207.

4. At all material times, each respondent was licensed under the Act.

5. On or about October 25, 1983, in the course of interstate commerce, complainant by oral contract sold to Nicho 360 lugs, wrapped, U.S. No. 1, Thompson seedless grapes, labeled "WE-4," a perishable agricultural commodity, at an agreed f.o.b. price of $8.00 per lug, plus 70 cents per lug for precooling and palletization, for a total f.o.b price of $3,132.00. The transaction was brokered by So. Central. The grapes were shipped to Nicho as part of a truckload of grapes which the complainant had sold to three Texas buyers (including Nicho) through So. Central. On the same day as the sale of the grapes, October 25, 1983, So. Central issued a broker's memorandum, No. 6775-1083, which confirmed the multiple sales to the three Texas buyers and indicated that all three shipments were to be loaded on the same truck. The truckload of grapes was shipped by complainant to the three Texas buyers on October 25, 1983, the same day as the sales to them. The bill of lading required that the temperature in the truck be maintained at 36°F. There was no temperature recorder on the truck.

6. On October 31, 1983, or six days after they were shipped from California, Nicho received its partial truckload of grapes consisting of 360 lugs. As its employees unloaded the grapes, they noted that the grapes seemed to have problems and ceased unloading them. After speaking to employees of So. Central, Nicho called for a federal inspection. The inspection was conducted on October 31, 1983, at 3:35 p.m., at the location of Nicho. The inspection certificate issued thereafter, E 188251, indicates that, at the time of the inspection, the temperature controls on the truck were still in operation. It further indicates that the load was partially unloaded but that some of the grapes remained in the nose of the trailer. The temperature range of the grapes is noted as being 45°F to 46°F in the rear, and 44°F to 45°F for the grapes which were still loaded in the nose of the truck. The condition of the grapes was noted as follows:

> Berries mostly firm and firmly attached to capstems. In most lugs from 2 to 6%, in some 14%, average 6% shattered berries. Stems mostly turning brown, many brown and pliable. Average 2% sulfur dioxide injury. In most lugs from 2 to 6%, in some 13%, average 6% serious damage by discolored berries. Average 1% crushed and

leaking berries. Decay ranges from 1 to 4%, and 2% Gray Mold Rot in all stages.

7. Based on the inspection, Nicho told So. Central that it was rejecting the grapes. So. Central reported this to complainant, specifically to a Mr. Bob Stockton ("Stockton") with whom the broker had been dealing on these transactions. After being advised of the results of the inspection, and that the temperature of the grapes "was fine," Stockton accepted the rejection. Eventually, the grapes were handled on consignment by Boler Farms, Pharr, Texas. The latter company returned proceeds to complainant in the amount of $450.00 and also indicated that 200 of the 360 lugs were dumped.

8. The normal transit time between complainant's location and that of Nicho is four days.

9. An informal complaint was received by the Department on June 4, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case focuses on whether or not Nicho had the right to reject the load of grapes on arrival. The complainant's position is that, since this was a f.o.b. sale and Nicho undertook the risks of transportation, the high temperature of the grapes as shown on the federal inspection certificate indicates that it had lost this right. In an f.o.b. transaction, a buyer accepts the risk of abnormal transportation conditions. *J.J. Crosetti Co.* v. *Yeckes-Eichenbaum*, 30 Agric. Dec. 287 (1971); 7 CFR § 46.43(i). Thus, the existence of abnormal transportation conditions voids a shipper's warranty of suitable shipping condition. *Ventura* v. *Regan*, 31 Agric. Dec. 443 (1972).

In the instant case, there is evidence that the load of grapes was not handled under normal transportation service and conditions: first, it appears that the shipment took about 48 hours longer than normally expected to reach Nicho's location from that of complainant; [1] and second, the temperature of the grapes was higher than normal, *i.e.*, the bill of lading called for a temperature of 36°F. to be maintained en route, but the federal inspection reflected that the temperatures of the grapes ranged from 44°F to 46°F.[2] In view

[1] Pursuant to 7 CFR § 47.25(f), we take official notice of this fact which is a commercial fact of established character. *See* Finding of Fact 8.

[2] Respondents argue that the 44°–46°F. temperatures which the grapes showed upon Federal inspection occurred because the unloading of the grapes was stopped when their alleged deterioration was discovered, and the grapes sat for a considerable length of time awaiting the Federal inspector. This explanation does not satis-

Continued

of this, we hold that Nicho's rejection was without reasonable cause. *Ventura* v. *Regan, supra*, 31 Agric. Dec. 443. Cf. *R.C. Walter & Sons* v. *Gatz*, 31 Agric. Dec. 655 (1972), in which the rejection was determined not to be unreasonable where transit time was normal, and the low temperatures of the grapes indicated normal carrying temperatures.

The measure of damages where a shipment is rejected without reasonable cause is the difference between the contract price and the amount realized from resale, provided the resale is made in good faith and in a commercially reasonable manner. *See, C. J. Prettyman, Jr. Inc.* v. *J. K. Packing Co.*, 28 Agric. Dec. 1476 (1969); U.C.C. § 2-706. The contract price in the instant case was $2,682.00, and the complainant received $450.00 from the resale of the grapes. As there is no allegation or proof that this resale was not prompt or properly conducted, we hold the sale to have been made in good faith and in a commercially reasonable manner. Accordingly, we hold that Nicho is obligated to complainant in the amount of $2,232, or the contract price ($2,682.00) less the proceeds on resale ($450.00). Nicho's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Complainant alleged that So. Central failed to carry out its duties as a broker, however, there are no facts alleged or proven by complainant by which we could so conclude. In view of that, the complaint is dismissed against So. Central.

ORDER

Within 30 days from the date of this order, Nicho Produce Co., Inc., shall pay to complainant, as reparation, $2,232.00 with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid.

The complaint against So. Central Brokerage, Inc., is dismissed.

Copies of this order shall be served upon the parties.

factorily explain the high temperatures because the grapes which were still loaded on board the truck with the cooling unit operating registered virtually the same temperatures as the grapes which had been unloaded. Had there been a temperature recorder on board the truck, perhaps respondents could have been sustained their argument. However, apparently respondents chose not to use a recorder on the truck.

BODEGAS RANCHO SAN VALENTIN S. DE R.L., *v.* OTAY PACKING CO., PACA Docket No. 2-6809. Decided June 27, 1986.

Consignment sales—failure to keep adequate records—audit accounting by Department official basis for reparation award.

Respondent failed to keep adequate records of consignment sales. Department's audit revealed lack of documentation in form of federal inspections to support very low returns relative to current market price as to numerous sales. Audit accounting, which assigned price to these sales based upon average gross price or other sales, was made basis for award of reparation in complainant's favor. Respondent was given credit on two sales for which documentation was supplied after commencement of formal proceedings.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,060.66 in connection with the shipment in interstate commerce of 13 truckloads or partial truckloads of eggplants.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. However, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bodegas Rancho San Valetin, S. de R.L., is a corporation whose address is 3566 Bentley Drive, Spring Valley, California.

2. Respondent, Otay Packing Co., is a corporation whose address is P.O. Box 3247, Chula Vista, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about September 30, through November 5, 1983, complainant consigned to respondent to be sold for complainant's account 13 truckloads or partial truckloads of "Buty Hybrid" eggplants, of various sizes, all to grade U.S. No. 1. The eggplants were shipped from complainant's place of business in Mexico and were received by respondent at its receiving docks in Chula Vista, California.

4. Complainant's shipping manifests show a total of 10,574 cartons of eggplants shipped to respondent. Respondent's receiving records show receipt of a total of 10,572 cartons. Respondent rendered accountings to complainant showing the resale of 10,607 cartons of eggplants for gross proceeds of $48,128.95, and net proceeds of $34,990.50. Additional expenses in connection with the packing, transportation, and sale of the eggplants totaled $11,014.20. Respondent paid complainant total net proceeds, after all expenses, of $23,976.50.

5. A personal investigation was made by an employee of this Department at the place of business of respondent between September 24 and October 4, 1984. Such investigation disclosed that respondent had failed to keep adequate records in that "(1) the respondent's invoices did not indicate specific lots; (2) there was an overlapping of lots on hand; and (3) sizes shown shipped did not correspond with exact sizes received." The audit accounting found that the amount of $11,060.66 remained due to complainant as underreported and underpaid "due primarily to adjustments of the sales prices to eliminate prices which were unusually low without supporting papers to substantiate them, such as inspection certificates or dump certificates." The audit accounting disclosed that 3,815 cartons were sold at unusually low prices, below $2.25 per carton, and assigned to such cartons the average gross price of $5.604018, or a total of $21,379.33. The gross proceeds on the remaining 6,757 cartons were accepted as shown by respondent's records in the total amount of $37,866.35, for total gross proceeds of $59,245.68. Total expenses, including a 12% commission allowance, amounted to $24,208.72, leaving net proceeds of $35,036.96. Subtracting the amounts previously paid by respondent to complainant, a remainder was computed as still due in the amount of $11,060.66.

6. Respondent granted a credit to one of its customers, Horwath & Associates, Inc. of Rohnart Park, California on 420 cartons of eggplants shipped October 22, 1983, in the total amount of $2,029.00. This credit was not taken into account by the audit accounting, but was supported by a federal inspection. Respondent allowed an additional credit in the amount of $1,204.00 on 215 cartons of eggplants, also sold to Horwath & Associates Inc., and

shipped on October 24, 1983. This credit was also supported by a federal inspection.

7. The informal complaint was filed on December 7, 1983, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent maintains that it actually overreported to complainant the amounts which it realized from the resale of the eggplants. However, as disclosed by the audit of respondent's records by an investigator from this Department, respondent failed to keep adequate records, and in addition reported many sales which were far below market price levels without inspection certificates or dump certificates to support such sales. However, respondent, in its answer, supplied two inspection certificates to support credit allowances in the total amount of $3,233.00 in connection with the resale of 635 cartons of eggplants. Although these two inspections covered a smaller number of cartons than those on which respondent granted credits, the inspections disclosed quality defects averaging 12% in one case, and 14% in the other, with a high range in one case of 17%, and 22% in the other. The high range of defects in each case shows that the total lot of eggplants would be out of grade even though the inspection did not cover the total lot. We find that respondent has adequately supported the credits granted in the total amount of $3,233.00. We also find that due to respondent's general failure to support the extremely low sale prices with adequate documentation it is liable to complainant for the $11,060.66 balance which the audit accounting found due, less the

FINUCANE GILSON & FOSTER, INC., *v.* DEARDORFF-JACKSON COMPANY, PACA Docket No. 2-6831. Decided June 27, 1986.

Settlement.

Where parties renegotiated the price provision of a contract after arrival of produce, buyer cannot claim reimbursement from seller after it allows its customer a further price adjustment.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se.*
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $1,157.65 in connection with a shipment of strawberries in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. The respondent filed a verified answering statement. It also filed a brief.

FINDINGS OF FACT

1. Complainant, Finucane Gilson & Foster, Inc., is a corporation whose mailing address is 3500 West 75th Street, Suite 100, Prairie Village, Kansas 66208.

2. Respondent, Deardorff-Jackson Co., is a corporation whose mailing address is 1120 Mountain View Avenue, Oxnard, California 93030. At all material times, respondent was licensed under the Act.

3. On or about April 4, 1984, respondent, by oral contract, sold to complainant 864 trays of strawberries at an agreed upon f.o.b. price of $4.50 per tray plus 60 cents per tray for cooling and palletizing,

$18.50 per unit for nine units of controlled atmosphere, and $11.25 for a recording thermometer, for a total f.o.b. price of $4,584.15. Respondent, in turn, sold the strawberries to the Fleming Companies, Inc. (Fleming), Topeka, Kansas 66601, for shipment to its establishment in Joplin, Missouri, for a price of $6.85 per tray plus $20.00 per unit for nine units of palletizing and artificial atmosphere, for a total f.o.b. price of $6,098.40.

4. Upon arrival in Joplin, Missouri, these strawberries were found, by a Federal inspector, to be somewhat deficient in quality. Respondent was contacted by the complainant and agreed to provide the complainant with protection against the handling of the strawberries by Fleming. Sometime thereafter, respondent's employees inquired of complainant as to the handling of the strawberries by Fleming. On or about May 1, 1984, complainant's employee, Earl Pearson, told respondent's salesman, David Cook, that Fleming was only seeking a $55.50 adjustment. Respondent agreed to permit complainant to deduct the same $55.50 from its invoice to complainant. Thereafter, complainant paid respondent's invoice less $55.50 or $4,528.65. Respondent accepted complainant's check in the amount of $4,528.65 as full and final settlement on the shipment of strawberries.

5. On or about May 8, 1984, complainant received notification from Fleming that it was deducting the cost of 169 trays of strawberries ($1,157.65) from its payment for an unrelated invoice.

6. The formal complaint was filed on November 26, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Complainant seeks reimbursement from respondent of $1,157.65 t allegedly overpaid respondent with respect to a transaction in nterstate commerce involving a shipment of strawberries. The alged overpayment occurred because Fleming, subsequent to an greement between the parties limiting an adjustment on the shipnent to $55.50, deducted a further $1,157.65 from an unrelated nipment claiming it as a further loss on the subject shipment of rawberries.

The evidence reflects that, on or about May 1, 1984, the parties negotiated their contract, and that, at that time, they agreed to a ew price which was $55.50 less than the original contract price. omplainant paid respondent the amount agreed upon ($4,528.65) the time, and respondent accepted it in full settlement of the irties' contractual agreement. Accordingly, complainant is preuded from seeking further damages from respondent as to this

shipment. *Bell City Brands* v. *Western Tomato,* 25 Agric. Dec. 402 (1966). Thus, the complaint should be dismissed.

ORDER

The complaint is dismissed.
Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION DECISIONS

S. STAMOULES, INC., a/t/a STAMOULES PRODUCE CO., *v.* SOL SALINS, INC., PACA Docket No. 2-6795. Decided May 1, 1986.

Reconsideration—denied.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Howard Silberberg, McLean, VA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on March 7, 1986, awarding reparation to complainant in the amount of $1,008.00, plus interest. On March 17, 1986, respondent filed a petition for reconsideration. Pursuant to section 47.24(a) of the Rules of Practice (7 CFR § 47.24(a)), the filing of the petition automatically operated to set aside the Decision and Order pending final action on the petition.

In its petition, respondent argues that the Decision and Order erroneously concluded that an accord and satisfaction did not occur because respondent's check did not indicate that it was being offered in full satisfaction of the transaction for which it was given in payment. Respondent asserts that the evidence shows that when respondent gave its $5,012.10 check to complainant, complainant was in possession of an invoice which complainant had sent to respondent, who had returned it with the notation "less allowance per Geo. Depaoli" and a deduction of $1,008.00. Respondent claims that complainant therefore was informed from sources other than the check itself that such check was being tendered in full payment.

Respondent's argument is completely without merit. We have often stated that "the mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to

be indebted to him only to the extent of payment made, does not necessarily establish an accord and satisfaction. *Half Moon Fruit & Produce Company* v. *North American Produce Distributors, Inc.*, 40 Agric. Dec. 1610, 1613 (1981); *Louis Caric & Sons* v. *Ben Gatz Co.*, 38 Agric. Dec. 1486 (1979); *Mendelson-Zeller* v. *Season Produce*, 31 Agric. Dec. 1288 (1972). On two occasions, we held that an accord and satisfaction did not take place even though the creditor was informed in writing that the check was in settlement of the disputed transaction. *See, Half Moon Fruit & Produce Company* v. *North American Produce Distributors, Inc., supra; Horvitz Brothers* v. *David Goldsamt*, 20 Agric. Dec. 391 (1961). There was clearly no accord and satisfaction in this case.

ORDER

The reparation awarded in the March 7, 1986, Decision and Order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

ALFONSO CHECCHI, *v.* L&J PACKING, INC., PACA Docket No. 2-6813. Decided May 2, 1986.

Dismissal.

Allan R. Kahan, Presiding Officer.
Daniel L. Rudnick, Bakersfield, CA, for complainant.
Thomas R. Oliveri, Newport Beach, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $73,408.77 in connection with a transaction involving the shipment of onions in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 4, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of April 4, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

LYN-DE FARMS, INC., *v.* TOM LANGE COMPANY, INC., PACA Docke No. 2-6986. Decided May 2, 1986.

Dismissal.

Ben Bruner, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,584.71 in connection with a transaction involving the shipment of cabbage in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 31, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 31, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PEMBERTON PRODUCE, INC., *v.* TOM LANGE COMPANY, INC., PACA Docket No. 2-7090. Decided May 2, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Matthew McInerney, Newport Beach, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,066.50 in connection with

transactions involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 31, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 31, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DEW-GRO, INC., a/t/a CENTRAL WEST PRODUCE, v. SEE SUN HO KEE, INC., PACA Docket No. 2-7114. Decided May 5, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Constance L. Rudnick, Boston, MA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,952.50 in connection with a transaction involving the shipment of sugar peas in interstate commerce.

BARTON WILLOUGHBY d/b/a WILLOUGHBY FARMS, *v.* FRITO-LAY, INC., PACA Docket No. 2-6614. Decided May 14, 1986.

Amendment of Order, counterclaim.

Decision by Donald A. Campbell, Judicial Officer.

AMENDMENT TO DECISION AND ORDER

On May 1, 1986, a Decision and Order was issued in this proceeding. Through inadvertence the "Order" portion of the Decision and Order did not set forth the statutory time periods within which the reparation award and attorney's fees must be paid. The Decision is not being changed. The Order is amended to provide the dates by which payment must be made, which is within 30 days of the issuance of this Amendment.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant as reparation $84,825.83, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

Within 30 days from the date of this order respondent shall pay to complainant for attorney's fees and other expenses $8,473.39, with interest thereon at the rate of 13 percent per annum from the date of this order until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

HARDEN FARMS, INC., d/b/a HARDEN FARMS OF CALIFORNIA, *v.* C. H. ROBINSON COMPANY, PACA Docket No. 2-7035. Decided May 15, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for complainant.
Owen Gleason, Esquire, Eden Prairie, MN, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,871.80 in connection with a

transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 25, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 25, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GLOBAL BERRY SALES, INC., *v.* TOM LANGE COMPANY, INC., PACA Docket No. 2-7047. Decided May 15, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,717.55 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 27, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 27, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC., *v.* H. SCHNELL & COMPANY, INC., and/or LLOYD MYERS CO., INC., PACA Docket No. 2-6414. Decided May 27, 1986.

Reconsideration—Stay.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), an Order Upon Rehearing was issued on April 9, 1986, awarding reparation to the complainant and against respondent Lloyd Myers Co., Inc., in the amount of $7,522.00 plus interest at the rate of 13 percent per annum from December 1, 1982, until paid. By petition received May 8, 1986, respondent Lloyd Myers Co., Inc., has moved that this matter be reconsidered.

Accordingly, the order of April 9, 1986 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant and respondent H. Schnell & Company, Inc.

SEALD SWEET GROWERS, INC., *v.* CREST FRUIT CO., a/t/a FRANK LEWIS FRUIT CO., PACA Docket No. 2-6949. Decided May 27, 1986.

Settlement—Dismissal.

George S. Whitten, Presiding Officer.
Charles M. Sanders, Jr., Tampa, FL, for complainant.
Scott Toothaker, McAllen, TX, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $143,367.00 in connection with transactions involving the shipment of grapefruit in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 29, 1986, complainant notified the Department

that the parties had come to a voluntary settlement of their dispute. Complainant, in its letter of April 29, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CHIQUITA BRANDS, INC., *v.* AL NAGELBERG & CO., INC., PACA Docket No. 2-7094. Decided May 28, 1986.

Dismissal.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
Louis Pulvermacher, New York, NY, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $41,921.53 in connection with a transaction involving the shipment of mixed perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. On or about April 1, 1986, complainant notified the Department by telephone that respondent tendered to complainant a check in full settlement of complainant's claim. A letter was sent to complainant on April 3, 1986, giving complainant 10 days in which to show cause why its complaint should not be dismissed. Complainant filed no response to this letter. Complainant, by its failure to respond to such letter, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HENRY T. JACOBS, *v.* KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC., PACA Docket No. 2-6531. Decided June 5, 1986.

Reparation proceeding—stayed by bankruptcy—reopened.

Andrew Stanton, Presiding Officer.
Complainant, *pro se.*
Jay L. Michaelson, Esquire, Santa Barbara, CA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER VACATING STAY ORDER, REOPENING PROCEEDING

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent and California Marketing of Bakersfield, Inc., in the alternative, in the amount of $705.00 in connection with a transaction involving the shipment of carrots in interstate commerce.

A copy of the formal complaint was served on respondents, but respondent Koster Enterprises failed to file an answer thereto. However, the Department was notified that respondent Koster Enterprises had filed a petition in bankruptcy. Accordingly, on May 9, 1984, this matter was stayed pending completion of respondent Koster Enterprises' bankruptcy.

On January 22, 1985, a Decision and Order was issued dismissing the complaint against California Marketing. The Decision and Order stated that the complaint against Koster Enterprises was unaffected by this ruling. In March 1986, the Department received copies of orders of discharge supposedly affecting respondent Koster Enterprises. However, those orders were found to be applicable only to certain individuals, not the respondent corporation. In a letter dated March 19, 1986, the Department gave respondent Koster Enterprises 20 days from its receipt of such letter to show cause why the May 9, 1984, Stay Order should not be vacated and the reparation proceeding reopened. Koster Enterprises did not respond to this letter.

Accordingly, the May 9, 1984, Stay Order is hereby vacated and the reparation proceeding is reopened against respondent Koster Enterprises. Respondent shall have 20 days from its receipt of this Order to file in triplicate an answer to the complaint, a copy of which is attached to this Order.

Copies of this order shall be served upon the parties.

SIGMA PRODUCE CORP. INC., *v.* HARVEY C. HANSEN, d/b/a HARVEY'S, PACA Docket No. 2-6685. Decided June 5, 1986.

Reconsideration—reparations reconsidered.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER GRANTING PETITION FOR RECONSIDERATION AND AMENDING PRIOR ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on August 22, 1985, awarding reparation to complainant against respondent. On September 3, 1985, respondent filed a petition for reconsideration, and on October 1, 1985, the order of October 22, 1985, was stayed and complainant was served with a copy of respondent's petition and given 15 days from date of receipt thereof in which to file an answer to the petition. Complainant did not file an answer.

In its petition respondent contends that our order of August 22, 1985, was in error in the factual determination that the tomatoes were originally shipped to respondent in Visalia, California and then diverted by respondent following shipment, to respondent's customer in Norfolk, Virginia. Respondent contends that the shipping documents indicating that the original destination was Visalia, California, were in error, did not reflect the agreement between the parties, and were not in accord with what actually happened. In support of this contention respondent quotes from paragraph 6 of the complaint which refers to "arrival of said truck at destination", as proof that complainant knew of the Virginia destination prior to shipment. Of course, this statement by complainant, while it may be taken as indicative of the inference which respondent urges, does not have to be so understood. Complainant could be referring to the ultimate Virginia destination without any necessary inference that complainant knew of that destination prior to shipment. Indeed this is the way we interpreted the statement at the time our original order was written. However, we have carefully reviewed the record in this matter, and two considerations lead us to the conviction that respondent is correct, and that our order of August 22, 1985, is in error. First, in a letter to this Department dated April 12, 1984, complainant's Dan Delgado stated that he had a discussion with respondent's Jim Stewart prior to the truck being loaded, in which complainant was informed that respondent's "cus-

tomer was being quoted" a lower price by competitors. While the customer is not named, the statement does lend credence to respondent's position. Second, complainant has nowhere in this proceeding advanced the position that the tomatoes were originally destined for Visalia, California, and then diverted by respondent to the Virginia customer. We conclude that we were unduly swayed by the destination stated on the shipping documents, and that complainant did in fact know prior to shipment that the tomatoes were destined for Norfolk, Virginia.

Of course this determination necessitates additional and substantial alteration in the conclusions relative to this case. First, we must now conclude that the suitable shipping condition warranty was applicable to the shipment of the subject tomatoes. Under that warranty (see 7 CFR § 46.43(j)) complainant was required to ship tomatoes which would arrive at the contract destination without abnormal deterioration provided transportation services and conditions were normal. The pulp temperatures of 50 to 51 degrees shown by the federal inspection following arrival are not much higher than the 46 degree ambient air temperature specified by complainant for the truck, and are not excessive for tomatoes. The inspection was made on the fourth day following shipment. This is not indicative of an excessive period of time in transit. We conclude, therefore, that transportation services and conditions were normal. The inspection showed the condition of the tomatoes as "average approximately 80% light red and red. 8 to 52% in most cartons, none in some, average 19% soft. Average 2% decay." Tomatoes, to make good delivery at destination, should not contain more than approximately 8% soft and/or decayed tomatoes. See 7 CFR § 51.1861(a)(2)(i); (b)(2)(i); (c)(2)(i); and (d)(2)(i); see also *Denice & Filice Packing Co.* v. *Super Food Services,* 38 Agric. Dec. 744 at 746–747 (1979). The high percentage of soft tomatoes present in this load clearly shows that complainant breached the warranty of suitable shipping condition.

The measure of damages for breach of warranty in regard to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. See UCC § 2–714. In this case respondent's customer rejected following unloading of the tomatoes. This was an act of acceptance. See *Crown Orchards Co.* v. *Mid-Valley Prod. Corp.,* 34 Agric. Dec. 381 (1975). Complainant took back 660 cartons of the tomatoes which respondent's customer made available, and resold them in New York, but failed to submit any data in regard to the proceeds of the resale. This of course makes it impossible for us to compute damages in the normal

manner. The primary burden of proof in regard to damages woul in this situation, normally fall upon respondent, and responde could, in theory have subpoenaed complainant's records in a effort to meet this burden. However, we feel that his would in fa be an extraordinary burden to place upon respondent in the co text of a shortened procedure case, especially where, as here, re spondent was not represented by counsel. On the other hand, com plainant also was not represented by counsel, and much the sam objection applies to penalizing complainant for failing to submi the necessary data for computation of damages. All in all, the most equitable solution to this problem, in our opinion, is to require that the cost of freight from Nogales, Arizona to Norfolk, Virginia be borne by complainant for those tomatoes which complainant repossessed and resold. Respondent paid this freight, but received no economic benefit from the tomatoes. Complainant did presumably receive economic benefit from the resale of the tomatoes, and it is therefore fitting, especially in view of complainant's breach, that complainant be made responsible for the freight. That freight amounted to $1.75 per flat, or $1,155.00 for the 660 flats which complainant took back. The reparation in the amount of $2,514.60 which we previously awarded should be reduced by this amount.

The order of August 22, 1985, insofar as it is in conflict with this order, is superseded. The stay order of October 1, 1985, is hereby vacated.

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, $1,359.60, with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Copies of this order shall be served upon the parties.

MISSION FRUIT & VEGETABLES DISTRIBUTORS, INC., *v.* CAL-MEX DISTRIBUTORS, INC., PACA Docket No. 2-6772. Decided June 5, 1986.

Reconsideration—denied.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (U.S.C. 499a *et seq.*), an order was issued on January 16, 1986, awarding reparation to complainant against respondent. On February 3, 1986, and within the time allowed by the Rules of Practice, respondent filed a petition for re-

consideration. The order of January 16, 1986, was automatically stayed pending issuance of a further order in this proceeding. See 7 CFR 47.24(a).

In its petition respondent contends that the order of January 16, 1986, is in error in several respects. We have reconsidered the order and find that respondent's contentions are without merit, and that the order is supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition should be and hereby is dismissed without prior service upon complainant. The order of January 16, 1986, is hereby reinstated, and the reparation awarded to complainant in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

MIC BRUCE, INC., a/t/a SINGERS, *v.* CHIQUITA BRANDS, INC., PACA Docket No. 2-6608. Decided June 10, 1986.

May 1, 1986 Order stayed—Reconsideration.

Decision by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on May 1, 1986, awarding reparation to the complainant in the amount of $17,134.63. By petition received May 13, 1986, complainant has moved that this matter be reconsidered.

Accordingly, the order of May 1, 1986, is hereby stayed. Respondent shall have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of complainant's petition shall be served upon the respondent.

CLARK & MCCORD SALES, INC., *v.* JOSEPH MERCURIO PRODUCE CORP., PACA Docket No. 2-6842. Decided June 10, 1986.

Dismissal.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $13,652.62 in connection with a transaction involving the shipment of cherry tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PANADOL BROS., INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-7147. Decided June 10, 1986.

Dismissal.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $27,674.50 in connection with transactions involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 12, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 12, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

JAMES C. ORR, Trustee in Bankruptcy for BRUCE C. LOFCHIE and ANITA J. LOFCHIE d/b/a BRUCE COMPANY, *v.* ANTHONY GAGLIANO & Co., INC., PACA Docket No. 2-6985. Decided June 11, 1986.

Complaint withdrawn.

John J. Casey, Presiding Officer.
Christine A. Goodrich, Fresno, CA, for complainant.
LeRoy W. Gudgeon, Northfield, IL, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation case under the Perishable Agricultural Commodities Act, complainant's counsel of record informed the presiding officer on April 18, 1986 that the complainant had decided to withdraw the complaint. Accordingly the complaint is hereby dismissed.

Copies hereof shall be served on the parties.

WHIZPAC, INC., *v.* THOMAS COLACE COMPANY, PACA Docket No. 2-7030. Decided June 11, 1986.

Dismissal—full settlement.

Dennis Becker, Presiding Officer.
Complainant, *pro se.*
William J. Fair, Springfield, PA, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $17,280.00 in connection with transactions involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 25, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement

of complainant's claim. Complainant, in its letter of April 25, 198 authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ALTON H. ALLEN and JOHN M. COELHO d/b/a SUNSET STRAWBERR GROWERS, *v.* V. F. LANASA, INC., PACA Docket No. 2-6686. Dc cided June 20, 1986.

Reconsideration—complainant's claim without merit—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on April 17, 1986, dismissing the complaint. On May 8, 1986, complainant petitioned for reconsideration of the April 17, 1986, order. In its petition, complainant asks us to rule that a buyer who receives produce in poor condition is required to have the temperature recording instrument, the tape of which shows acceptable in transit temperatures, recalibrated for accuracy. This burden has never been placed on a receiver, and should not be done so now. Had complainant wanted the instrument recalibrated, it should have taken the steps necessary to do so.

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of April 17, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition for reconsideration is dismissed without prior service upon respondent.

The order of April 17, 1986, is reinstated.

Copies of this order shall be served upon the parties.

G.A.C. PRODUCE CO., INC. *v.* OTAY PACKING CO., PACA Docket No. 2-6872. Decided June 20, 1986.

Reconsideration—Petition without merit—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on May 5, 1986, dismissing the complaint. The dismissal had been preceeded, on August 26, 1985, by an order requiring respondent to pay complainant $50,574.00 plus interest which it had admitted it owed complainant. Dismissal of the complaint regarding the $2,592.00 remaining in dispute was ordered because complainant had failed to respond to respondent's sworn answer in which it alleged that complainant had granted it a $2,592.00 allowance. Thus, we concluded that respondent's assertion was a true statement of fact.

In its petition for reconsideration, complainant submits that it had not agreed to give respondent the $2,592.00 allowance. Complainant had sufficient opportunity to respond to this allegation before the record was closed and the May 5, 1986, decision was issued. Accordingly, its unsworn denial of the respondent's allegation at this time has no merit and, in any event, is untimely filed. 7 CFR § 47.24(b).

Upon review of the record, we are of the opinion that complainant's claims are without merit, and we conclude that our order of May 5, 1986, is amply supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition for recommendation is dismissed without prior service upon respondent.

The order of May 5, 1986, is reinstated.

Copies of this order shall be served upon the parties.

PURE GOLD, INC., *v.* VICTOR'S PRODUCE, INC., PACA Docket No. 2-6944. Decided June 26, 1986.

Reopening.

Decision by Donald A

ORDE

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Deci-

sion and Order was issued on April 24, 1986, requiring respondent to pay complainant $1,861.00, plus interest, as reparation. The order became final on May 24, 1986. *See* 7 U.S.C. § 499g. From that date forward, since respondent did not file a timely appeal of the order, neither the Secretary nor a court has jurisdiction to hear such an appeal. *American Fruit Growers* v. *Lewis D. Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948).

On May 28, 1986, by a May 15, 1986, letter, respondent has requested reconsideration of the Decision and Order. In view of the above, we have no jurisdiction to consider the matter. Moreover, it should be noted that the filing of this untimely petition does not in any way stay the effective date of the April 24, 1986, Decision and Order, nor does it stay any sanction which may accrue to respondent for failing to satisfy the April 24, 1986, Decision and Order.

Respondent's petition is dismissed.

Copies of this order shall be served on the parties.

FRANK DONIO, INC., *v.* FRESHVILLE PRODUCE DISTRIBUTORS, INC., PACA Docket No. 2-7148. Decided June 26, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $27,528.95 in connection with a transaction involving shipments of mixed produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 21, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 21, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISION ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

TEXAS DISTRIBUTING CO. INC. *v.* BEST PRODUCE CO. INC. a/t/a NEW AIRLINE PRODUCE CO. PACA Docket No. RD-86-247. Decided May 1, 1986.

Respondent was ordered to pay complainant, as reparation, $48,558.25 plus 13 percent interest per annum from July 1, 1984, until paid.

BUSHMAN'S INC. *v.* FRESHVILLE PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-239. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $25,615.50 plus 13 percent interest per annum from November 1, 1985, until paid.

INN FOODS INC. *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-240. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $16,614.21 plus 13 percent interest per annum from October 1, 1985, until paid.

SUN WORLD INTERNATIONAL INC. *v.* SUN FRESH PRODUCE CO. INC. PACA Docket No. RD-86-241. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $3,105.55 plus 13 percent interest per annum from April 1, 1985, until paid.

C. H. ROBINSON COMPANY *v.* MIKE D. PERKINS d/b/a TRIANGLE PRODUCE. PACA Docket No. RD-86-242. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $2,950.60 plus 13 percent interest per annum from May 1, 1985, until paid.

WILLIAM Y. MURPHEY d/b/a NATIVE AMERICAN FARMS *v.* JOE PINTO & SON. PACA Docket No. RD-86-244. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $2,639.00 plus 13 percent interest per annum from August 1, 1985, until paid.

J-B DISTRIBUTING CO. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-245. Decided May 7, 1986.

Respondent was ordered to pay complainant, as reparation, $5,584.40 plus 13 percent interest per annum from October 1, 1985, until paid.

PAYETTE VALLEY FRUIT INC. *v.* GILO'S PRODUCE CO. PACA Docket No. RD-86-246. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $2,388.00 plus 13 percent interest per annum from February 1, 1985, until paid.

LINDEMANN FARMS INC. *v.* JOSEPH PINTO d/b/a JOE PINTO & SON. PACA Docket No. RD-86-248. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $19,725.44 plus 13 percent interest per annum from November 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, $256.50 plus 13 percent interest per annum from October 1, 1985, until paid.

SUN VALLEY FOODS INC. *v.* BRUCE PRODUCE BROKERAGE CO. INC. PACA Docket No. RD-86-251. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $2,742.95 plus 13 percent interest per annum from April 1, 1985, until paid.

AMCLO INTERNATIONAL MARKETING 82 INC. *v.* THE JIM FAULKNER CO. INC. PACA Docket No. RD-86-252. Decided May 8, 1986.

Respondent was ordered to pay complainant, as reparation, $3,405.40 plus 13 percent interest per annum from November 1, 1984, until paid.

C. RAKER & SONS *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-253. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $18,456.50 plus 13 percent interest per annum from October 1, 1985, until paid.

LOS MACHOS FARMS d/b/a BIG RIVER DEVELOPMENT CO. *v.* JOHN E. REYNA d/b/a REYNA BROTHERS. PACA Docket No. RD-86-254. Decided May 21, 1986.

Respondent was ordered to pay complainant $6,642.15 plus 13 percent interest per annum until paid.

SUN WORLD INTERNATIONAL INC. *v.* KEVIN LYNN LUTHER d/b/a LUTHER PRODUCE. PACA Docket No. RD-86-255. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $18,068.45 plus 13 percent interest per annum from June 1, 1985, until paid.

TEIXEIRA FARMS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-257. Decided May 21, 1986.

Respondent was ordered to pay complainant, as reparation, $3,489.50 plus 13 percent interest per annum from October 1, 1985, until paid.

DANNA & DANNA INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-258. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $510.00 plus 13 percent interest per annum from September 1, 1985, until paid.

OREGON ONIONS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-259. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $6,269.25 plus 13 percent interest per annum from October 1, 1985, until paid.

LINDEMANN FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-260. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $4,535.28 plus 13 percent interest per annum from September 1, 1985, until paid.

VENIDA PACKING INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-261. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $2,419.50 plus 13 percent interest per annum from August 1, 1985, until paid.

REYNOLDS PACKING COMPANY a/t/a M & R COMPANY *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-262. Decided May 22, 1986.

Respondent was ordered to pay complainant, as reparation, $8,022.65 plus 13 percent interest per annum from September 1, 1985, until paid.

J. L. BRANCH PACKING CO. *v.* AL NAGELBERG & CO. INC. PACA Docket No. RD-86-264. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $42,303.78 plus 13 percent interest per annum from December 1, 1984, until paid.

SUNKIST GROWERS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-265. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $2,790.00 plus 13 percent interest per annum from November 1, 1985, until paid.

SAHARA PACKING COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-266. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $1,772.00 plus 13 percent interest per annum from October 1, 1985, until paid.

ACTION PRODUCE *v.* V & A PRODUCE. PACA Docket No. RD-86-267. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $1,327.50 plus 13 percent interest per annum from September 1, 1985, until paid.

M. L. GALLOWAY INTERNATIONAL INC. a/t/a GALLOWAY FARMS INTERNATIONAL *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-268. Decided May 28, 1986.

Respondent was ordered to pay complainant, as reparation, $11,532.25 plus 13 percent interest per annum from May 1, 1985, until paid.

BAKER BROKERAGE INC. a/t/a RUDY BROKERAGE CO. *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-276. Decided May 30, 1986.

Respondent was ordered to pay complainant, as reparation, $4,608.85 plus 13 percent interest per annum from April 1, 1985, until paid.

GROWERS MARKETING SERVICE INC. *v.* BUONPASTORE & CO. INC. PACA Docket No. RD-86-277. Decided May 30, 1986.

Respondent was ordered to pay complainant, as reparation, $57,715.26 plus 13 percent interest per annum from August 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, $8,362.50 plus 13 percent interest per annum from April 1, 1985, until paid.

PAPPAS & CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-274. Decided June 3, 1986.

Respondent was ordered to pay complainant, as reparation, $18,045.78 plus 13 percent interest per annum from September 1, 1985, until paid.

RIO VISTA LIMITED a/t/a GIUMARRA OF ESCONDIDO *v.* LA HACIENDA BRANDS INC. PACA Docket No. RD-86-279. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $27,298.50 plus 13 percent interest per annum from August 1, 1985, until paid.

VEG-A-MIX *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-280. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,221.25 plus 13 percent interest per annum from October 1, 1985, until paid.

TEIXEIRA FARMS INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-281. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,608.85 plus 13 percent interest per annum from September 1, 1985, until paid.

V. H. AZHDERIAN & CO. INC. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-282. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $4,785.96 plus 13 percent interest per annum from September 1, 1985, until paid.

BONITA PACKING CO. a/t/a BETTERAVIA FARMS *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-283. Decided June 13, 1986.

Respondent was ordered to pay complainant, as reparation, $1,129.95 plus 13 percent interest per annum from September 1, 1985, until paid.

THE GARIN COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-284. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,770.10 plus 13 percent interest per annum from November 1, 1985, until paid.

GARNAND MARKETING INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-285. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $10,112.25 plus 13 percent interest per annum from January 1, 1986, until paid.

LOUIS J. CARIC and STEVEN L. CARIC d/b/a LOUIS CARIC & SONS *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-286. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,736.00 plus 13 percent interest per annum from September 1, 1985, until paid.

CHIQUITA BRANDS INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-287. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $10,621.28 plus 13 percent interest per annum from December 1, 1985, until paid.

STEVCO INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-288. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $1,026.00 plus 13 percent interest per annum from October 1, 1985, until paid.

PHELAN & TAYLOR PRODUCE COMPANY INC. *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-289. Decided June 17, 1986.

Respondent was ordered to pay complainant, as reparation, $2,514.50 plus 13 percent interest per annum from October 1, 1985, until paid.

GOLD DIGGER APPLES INC. *v.* JORGE L. RIVAS d/b/a PANCHO'S PRODUCE CO. PACA Docket No. RD-86-290. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $1,176.00 plus 13 percent interest per annum from August 1, 1985, until paid.

BEEF STAKE TOMATO GROWERS INC. *v.* PREMIUM PRODUCE CORP. PACA Docket No. RD-86-291. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $9,120.00 plus 13 percent interest per annum from November 1, 1985, until paid.

S. STAMOULES INC. a/t/a STAMOULES PRODUCE CO. *v.* AKAHOSHI DISTRIBUTING INC. PACA Docket No. RD-86-292. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $21,916.44 plus 13 percent interest per annum from September 1, 1985, until paid.

NATURIPE BERRY GROWERS *v.* BAKKER SALES INCORPORATED. PACA Docket No. RD-86-293. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $37,155.00 plus 13 percent interest per annum from September 1, 1985, until paid.

NIKADEMOS DISTRIBUTING COMPANY INC. *v.* BOLIVAR G. GAMEZ d/b/a ROBIL INTERNATIONAL. PACA Docket No. RD-86-295. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $2,327.75 plus 13 percent interest per annum from April 1, 1985, until paid.

A.T.B. DISTRIBUTING CO. *v.* BEACON PRODUCE CO. PACA Docket No. RD-86-296. Decided June 18, 1986.

Respondent was ordered to pay complainant, as reparation, $5,460.90 plus 13 percent interest per annum from October 1, 1985, until paid.

JACKIE M. JORDAN *v.* STEVEN K. CHUNG d/b/a LEE'S MARKET PRODUCE. PACA Docket No. RD-86-297. Decided June 19, 1986.

Respondent was ordered to pay complainant, as reparation, $21,103.00 plus 13 percent interest per annum from July 1, 1985, until paid.

SUNKIST GROWERS *v.* J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-298. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $2,282.00 plus 13 percent interest per annum from June 1, 1985, until paid.

SCOTT FINKS CO. INC. *v.* OLYMPIC WHOLESALE PRODUCE & FOODS INC. PACA Docket No. RD-86-299. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $830.00 plus 13 percent interest per annum from July 1, 1985, until paid.

ROYAL FRUIT COMPANY *v.* INTER-TEX ENTERPRISES INC. PACA Docket No. RD-86-300. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $1,894.25 plus 13 percent interest per annum from November 1, 1985, until paid.

DOLE FRESH FRUIT COMPANY *v.* WALLA WALLA PRODUCE COMPANY. PACA Docket No. RD-86-301. Decided June 30, 1986.

Respondent was ordered to pay complainant, as reparation, $14,544.50 plus 13 percent interest per annum from January 1, 1986, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS

SUNRISE PRODUCE, INC., *v.* RUSS ELLIS, d/b/a EVERYBODY'S PRODUCE, PACA Docket No. RD-86-201. Decided May 2, 1986.

Bankruptcy—Automatic Stay—Continuance.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $10,618.75 against respondent in connection with transactions in

interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Sunrise Produce, Inc., is a corporation whose address is P. O. Box 306, Quincy, Washington 98848. Respondent, Russ Ellis, doing business as Everybody's Produce, is an individual whose address is P. O. Box 1170, Clearlake Park, California. Respondent was licensed or was subject to license under the Act at the time of the transactions involved herein.

Prior to the default in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Northern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

KERMIT CHAPMAN & SONS, INC., *v.* AL NAGELBERG & CO., INC., PACA Docket No. RD-86-219. Decided May 2, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of March 28, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

VALERIO'S PRODUCE, *v.* F. BOGON COMPANY, PACA Docket No. RD-86-222. Decided May 15, 1986.

Full settlement—dismissed.

Dennis Becker, Presiding Officer.
William J. Fair, Springfield, PA, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *eq seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,664.60 in connection with transactions involving the shipment of perishable agricultural commodities in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 11, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of April 11, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FOUR STAR TOMATO, INC., *v.* REM BROKERAGE CO., INC., PACA Docket No. RD-86-129. Decided May 27, 1986.

Complaint improperly served—Complaint reopened.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance

of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Respondent's claim that the complaint was signed for by someone from L. R. Clark Company, which has an office in respondent's building, and not respondent, is borne out by the signature on the return receipt card. Therefore, the complaint was not properly served. Accordingly, respondent's default in the filing of an answer is set aside. Respondent will have 10 days from receipt of this order to file an answer.

Copies of this order shall be served upon the parties.

SARGENT PRODUCE COMPANY *v.* BOLER FARMS, PACA Docket No. RD-86-275. Decided May 27, 1986.

Full settlement—dismissed.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,565.25 in connection with a transaction involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated May 7, 1986, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of May 7, 1986, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FLANAGAN & JONES, INC., *v.* RUSS ELLIS, d/b/a EVERYBODY'S PRODUCE, PACA Docket No. RD-86-243. Decided June 10, 1986.

Bankruptcy discharged—Continuance.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $4,937.50 against respondent in connection with transactions in interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Flanagan & Jones, Inc., is a corporation whose address is P. O. Box 487, Quincy, Washington 98848. Respondent, Russ Ellis, doing business as Everybody's Produce, is an individual whose address is P. O. Box 1170, Clearlake Park, California. Respondent was licensed or was subject to license under the Act at the time of the transactions involved herein.

Prior to the default in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Northern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC., *v.* J. V. CAMPISI, INC., PACA Docket No. RD-86-185. Decided June 11, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall be given 10 days from its receipt of this order in which to file its answer.

Copies of this order shall be served upon the parties.

C. H. ROBINSON COMPANY, *v.* ED SCHWARTZ, d/b/a ED'S FARMERS MARKET, PACA Docket No. RD-86-192. Decided June 11, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall have 10 days from its date of this order in which to file its answer.

Copies of this order shall be served upon the parties.

THE PRODUCE PLACE, *v.* THE GUY C. PANNO COMPANY, INC. a/t/a PRODUCE PLUS, PACA Docket No. RD-86-191. Decided June 20, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent will have 10 days from its receipt of this order to file an answer. If a timely answer is not filed, in triplicate, the Default Order will be reinstated.

Copies of this order shall be served upon the parties.

JOS. CIMINO FOODS, INC., *v.* CONTINENTAL PRODUCE, INC., PACA Docket No. RD-86-227. Decided June 20, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded tha the motion to reopen was filed within a reasonable time, and tha good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the respondent shall be given twenty days from its receipt of this order in which to file an answer to the complaint.

Copies of this order shall be served upon the parties.

TOM LANGE COMPANY, INC., *v.* DIXIELAND PRODUCE INC., PACA Docket No. RD-86-256. Decided June 25, 1986.

Petition to reopen—claim untimely filing due to paperwork—denied—Reparation awarded.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON PETITION TO REOPEN, AND DEFAULT ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in connection with a transaction involving vegetables, all being perishable agricultural commodities, in interstate commerce. A copy of the formal complaint was served upon respondent and respondent has not filed an answer thereto. By letter dated April 23, 1986, received by the Department on April 29, 1986, respondent petitioned for reopening of its default. In support of its petition, respondent claimed that, although it had received the complaint, due to a "paper-work [back] up" the complaint was not located until after it received the Department's April 15, 1986, notice that it was in default. The record reflects that respondent was served with a copy of the complaint on February 26, 1986, by certified mail. We cannot accept its claim that a "paper-work [back] up" caused it to misplace official correspondence received by certified mail until it received the April 15, 1986, letter. While these matters are handled in a somewhat less formal manner than court proceedings, nevertheless the members of the produce industry cannot choose to ignore them. Some modicum of formality must be followed. It appears that respondent elected to deal with this matter in a cavalier fashion. Somewhat more is required of persons who get served with copies of formal reparation complaints by certified mail which are accompanied by a Departmental letter calling

for a response thereto within 20 day of receipt. In view of this, respondent's petition to reopen is denied. Accordingly, the issuance of an order without further procedure is appropriate pursuant to Section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complaint, Tom Lange Company, Inc., is a corporation whose mailing address is P.O. Box 4701, Springfield, Illinois 62708. Respondent, Dixieland Produce Inc., is a corporation whose mailing address is Box 5474, Birmingham, Alabama 35207.

Respondent was licensed under the Act at the time of the transaction involved herein. The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order and constitute a violation or violations by respondent of Section 2 of the Act (& U.S.C. 499b). Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, the amount stated below, which we find to be the amount of damages to which complainant is entitled as a result of the violation found herein, with interest thereon at the rate of 13 percent per annum from the following date, until paid.

REPARATION AWARD: $4,402.60, with interest thereon from June 1, 1985, until paid.

Copies hereof shall be served upon the parties.

H. SCHNELL & COMPANY, INC., *v.* MEDINA FRUITS & VEGETABLES, INC., PACA Docket No. RD-86-169. Decided June 26, 1986.

Default set aside.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer and a Default Order was issued on March 3, 1986. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Pursuant to 7 CFR 47.25(e), no

spondent will have 10 days from receipt of this order to file an answer, in triplicate. If respondent fails to do so, the Default Order will be reinstated.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC., *v.* P. J. PRODUCE CO., PACA Docket No. RD-86-229. Decided June 26, 1986.

Denied—untimely.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR REOPENING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a default order was issued on April 29, 1986, requiring respondent to pay complainant $726.00, plus interest, as reparation. The order became final on May 29, 1986. *See* 7 U.S.C. § 499g. From that date forward, since respondent did not file a timely appeal of the order, neither the Secretary nor a court has jurisdiction to hear such an appeal. *American Fruit Growers* v. *Lewis D. Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948).

On June 2, 1986, by a May 30, 1986, telegram, respondent has requested reopening of its default. In view of the above, we have no jurisdiction to consider the matter. Moreover, it should be noted that the filing of this untimely petition does not in any way stay the effective date of the April 29, 1986, Default Order, nor does it stay any sanction which may accrue to respondent for failing to satisfy the April 29, 1986, Default Order.

Respondent's petition is dismissed.

Copies of this order shall be served on the parties.

failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

DISCIPLINARY DECISIONS

In re: SUPER BROTHERS EXOTIC NURSERY, INC., PQ Docket No. 203. Decided May 2, 1986.

Shipment of nursery stock—not inspected—Civil Penalty—Consent.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

On March 4, 1986, this proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151 - 164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged that the respondent violated the Acts and regulations promulgated thereunder (7 CFR §§ 301.75-301.75-8). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Super Brothers Exotic Nursery, Inc., respondent, is a corporation whose address is 17190 S.W. 216th Street, Goulds, Florida 33170.

2. On or about April 9, 1985, at Miami, Florida, the respondent offered to Eastern Airlines, for shipment to Puerto Rico, two cartons of Florida citrus nursery stock on airbill number 49-46-9792.

CONCLUSIONS

The respondent has admitted the jurisdictional facts and has agreed to the provisions set forth in the following order in disposition of this proceeding. Therefore, such order and decision will be issued.

ORDER

The respondent Super Brothers Exotic Nursery, Inc. is assessed a civil penalty of three hundred seventy-five dollars ($375). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day of this order is served upon the respondent.

In re: WESTERN AIRLINES, PQ Docket No. 96. Decided May 12, 1986.

Released infected flowers without inspection—Civil Penalty—Consent.

Clement McGovern, for complainant.
Robert Crane, Corporate Attorney, Los Angeles, CA, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (7 CFR § 319.74 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Western Airlines, respondent, is a corporation doing business at Los Angeles International Airport, 10053 International Road, Los Angeles, California 90045.

2. On or about September 6, 1985, the respondent was in possession of cut flowers from the Netherlands which were infested with lepidopterous larvae, an actionable pest.

3. On or about January 19, 1985, the respondent released cut flowers from the Netherlands without proper inspection.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: PEGGY SAY, PQ Docket No. 178. Decided May 12, 1986.

Uninspected luggage—Civil Penalty—Consent.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek the judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Peggy Say, respondent, is an individual whose address is 18542 Pueblo Circle, Huntington, California 92646.

2. On or about February 14, 1985, respondent was in possession of several pieces of luggage at Honolulu International Airport.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order and Decision will be issued.

ORDER

The respondents is assessed a civil penalty of one hundred and twenty five dollars ($125.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: AERO MAYFLOWER TRANSIT COMPANY, INC., PQ Docket No. 211. Decided May 14, 1986.

Moved outdoor household articles interstate—no inspection—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. The respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Aero Mayflower Transit Company, Inc., respondent, is a corporation whose mailing address is Box 107B, Indianapolis, Indiana 46206–0107.

2. On or about October 10, 1985, the respondent moved interstate outdoor household articles from Ledyard, Connecticut, to Duluth, Minnesota.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred twenty-five dollars ($525.00). The respondent shall make payment by sending a certified check or money order, payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250–1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: THADDEA NAVIGATION CO., LTD., PQ Docket No. 204. Decided May 20, 1986.

Foreign-origin garbage not in proper containers—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Federal Plant Pest Act (7 U.S.C. § 150aa *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*) and the Act of February 2, 1903, as amended, (21 U.S.C. §§ 111 and 120) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Thaddea Navigation Co., Ltd, violated the Acts and regulations promulgated thereunder (7 CFR Part 330 and 9 CFR Part 94). Respondent Thaddea Navigation Co., Ltd., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Thaddea Navigation Co., Ltd., admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure:

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Thaddea Navigation Co., Ltd., also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACTS

1. Thaddea Navigation Co., Ltd., respondent herein, is a company whose agent for purposes of service of process is, Eller and Co., Inc., Box 4304, Jacksonville, Florida 32001.

2. On or about May 1, 1985, the respondent's ship, the "Eftychis M", was within the territorial waters of the United States at Jacksonville, Florida, and the ship's foreign-origin garbage was not contained in tight, leak-proof covered receptacles.

CONCLUSION

Respondent, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order, in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Thaddea Navigation Co., Ltd, is assessed a civil penalty of two hundred fifty dollars ($250.00), which shall be payable to the "Treasurer of the United States", by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before May 15, 1986.

This Order shall become effective upon service of the respondent.

In re: SOUTHERN STAR, PQ Docket No. 214. Decided May 20, 1986.

Stored regulated garbage aboard ship—Civil Penalty—Consent.

Clement McGovern, for complainant.
Daniel L. Smith, Jr., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

this proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Southern Star, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 93.1 and 7 CFR § 380.1 and 7 CFR § 1.130 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining

allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with the proceeding.

FINDINGS OF FACT

1. Southern Star, respondent, is a corporation whose principle place of business is 245 Park Avenue, New York, New York 10167.

2. On or about November 29, 1985, the respondent stored regulated garbage aboard the vessel M/V EUGENIE-C, at Wilmington Maine Terminal, Wilmington, Delaware.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

In re: HERBERT HAYNES and H. C. HAYNES, INC. PQ Docket No. 172. Decided May 23, 1986.

Moved logs from moth high risk area through unregulated areas—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Kevin Cuddy, Bangor, ME, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151 *et seq.* and 150aa *et seq.*), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Herbert Haynes and H. C. Haynes, Inc., respondents, violated the Act and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. The respondent, Herbert Haynes, is dismissed from this proceeding.

2. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent, H. C. Haynes, Inc., specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits for the purpose of compromise only to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

3. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. H. C. Haynes, Inc., respondent, is a corporation doing business at Route 2, Box 96, Winn, Maine 04495.

2. On or about September 24, 1985, the respondent caused to move interstate regulated articles, specifically 3,000 board feet of

pine logs with bark, from Brimfield, Massachusetts, a gypsy moth high risk area, through a nonregulated area in Maine, to Armstrong, Quebec, Canada.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order ahd decision will be issued.

ORDER

The respondent, Herbert Haynes, is dismissed from this proceeding. The respondent, H. C. Haynes, Inc., is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall make payment by sending a certified check or money order, payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: EASTERN AIR LINES, INC., EGBERT HERNANDEZ, JOSE PADIN, and TONY RIVERA, PQ Docket No. 216. Decided May 29, 1986.

Uninspected luggage—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Francisco Ponsa-Flores, San Juan, PR, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Eastern Air Lines, Inc., Egbert Hernández, José Padín and Tony Rivera, violated the PQA and regulations promulgated thereunder (7 CFR Subpart 318.58). Respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, Tony Rivera and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, and Tony Rivera, admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision, and;

2. Respondents Eastern Air Lines, Inc., Egbert Hernández, José Padín, and Tony Rivera, also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by them in connection with this proceeding.

FINDINGS OF FACTS

1. Eastern Air Lines, Inc., respondent, herein, is a company, whose address for purposes of service of process is, Eastern Air Lines, Inc., Legal Affairs Department, Miami International Airport, Miami, Florida 33148.

2. Egbert Hernández, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Airlines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

3. José Padín, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Air Lines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

4. Tony Rivera, respondent herein, is an individual and at all times material, an employee of Eastern Air Lines, Inc., whose place of business address is c/o Eastern Air Lines, Inc., Luis Muñoz Marín International Airport, San Juan, Puerto Rico 00913.

5. On or about September 22, 1985, respondent Eastern Air Lines, Inc., and respondent Egbert Hernández possessed three pieces of baggage at Luis Muñoz Marín International Airport, San Juan, Puerto Rico destined for Hartsfield International Airport, Atlanta, Georgia.

6. On or about October 6, 1985, respondent Eastern Air Lines, Inc., and respondent José Padín possessed two pieces of baggage at

Luis Muñoz Marín International Airport, San Juan, Puerto Rico, destined for John F. Kennedy International Airport, Jamaica, New York.

7. On or about October 19, 1985, respondent Eastern Air Lines, Inc., and respondent Tony Rivera possessed one piece of baggage at Luis Muñoz Marín International Airport, San Juan, Puerto Rico, destined for John F. Kennedy International Airport, Jamaica, New York.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Eastern Air Lines, Inc., is assessed a civil penalty of two thousand three hundred and fifty dollars ($2,350); and

Respondent Egbert Hernández is assessed a civil penalty of one hundred twenty five dollars ($125); and

Respondent José Padín is assessed a civil penalty of one hundred twenty five dollars ($125); and

Respondent Tony Rivera is assessed a civil penalty of one hundred twenty five dollars ($125), said civil penalties shall be paid by certified checks or money orders, payable to, "The Treasurer of the United States" and they shall be sent to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Bldg., U. S. Department of Agriculture, Washington, D. C. 20250-1400, on or before May 30, 1986.

This Order shall become effective upon filing with the Hearing Clerk by the Administrative Law Judge.

In re: REBECCA MIRANDA, PQ Docket No. 208. Decided May 30, 1986.

Complainant filed to dismiss—Dismissed.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant filed a motion to dismiss the complaint without prejudice on the ground of newly discovered evidence.

IT SHOULD BE AND HERE BY IS ORDERED that the complaint is dismissed without prejudice.

In re: JOSETTE RATON, PQ Docket No. 245. Decided May 30, 1986.

Complainant's motion to dismiss—Dismissal.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant filed a motion to dismiss the complaint on the grounds that prosecution is no longer warranted to effect the purposes of the program.

IT SHOULD BE AND HERE BY IS ORDERED that the complaint is dismissed without prejudice.

In re: BAO CHAN d/b/a HAWAII TROPICAL PRODUCTS, PQ Docket No. 20. Decided June 2, 1986.

Offered uninspected plants for shipment—Civil Penalty—Consent.

Terry Medley, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7

U.S.C. §§ 151–164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Bao Chan d/b/a Hawaii Tropical Products, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980, as amended (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bao Chan d/b/a Hawaii Tropical Products, respondent, is a company whose address is P. O. Box 618, Kurtistown, Hawaii 96760.

2. On or about February 14, 1984, the respondent offered for shipped to a common carrier from Hilo, Hawaii, to San Francisco, California 240 pounds of breadfruit and 140 pounds of green jackfruit.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred and fifty dollars ($250.00) which shall be payable to the "Treasurer of

the United States" by certified check or money order, and which shall be forwarded to Terry L. Medley, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S.W., Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: IBERIA AIRLINES, PQ Docket No. 236. Decided June 2, 1986.

Uninspected meat products brought to Puerto Rico—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Iberia Airlines, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 94.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Iberia Airlines, respondent, is a business having its principal place of business at Luis Munoz Marin International Airport, Isle Verde, Puerto Rico 00913.

2. On or about May 23, 1985, the respondent brought a shipment of meat products within the territorial limits of the United States at San Juan, Puerto Rico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00). The respondent shall send a certified check or money order for $500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: MALONE & HYDE, INC., PQ Docket No. 235. Decided June 4, 1986.

Movement of uninspected fruit—Civil Penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 161 and 162), and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service alleging that Malone & Hyde, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR §§ 301.75 *et seq.*). The parties have agreed

that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Malone & Hyde, Inc., respondent, is a corporation whose mailing address is P. O. Box 520427, Miami, Florida 33152.

2. On or about May 1, 1985, the respondent moved a quantity of oranges from Florida, to Puerto Rico.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of seven hundred fifty dollars ($750.00). The respondent shall send a certified check or money order for $750.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: WONG'S PRODUCE, PQ Docket No. 205. Decided June 6, 1986.

Offered uninspected produce for shipment—Civil Penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Wong's Produce violated the PQA and regulations promulgated thereunder (7 CFR subpart 318). Respondent Wong's Produce and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Wong's Produce admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

United States, approximately 110 pounds of litchi and 40 pounds of soursops.

CONCLUSIONS

Respondent Wong's Produce, having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Wong's Produce, is assessed a civil penalty of six hundred dollars ($600.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, on or before June 30, 1986.

This Order shall become effective on the day of service upon the respondent.

In re: RENE VALLALTA. PQ Docket No. 138. Decided June 17, 1986.

Importation of prohibited seed pod—Prohibition unknown—Civil penalty.

The Judicial Officer affirmed Judge Weber's decision and order assessing a civil penalty of $250 against respondent for importing one cacao pod from El Salvador into the United States in violation of the Plant Quarantine Act and regulations. Respondent's request for a hearing to show that a relative had placed the article in his bags without his knowledge was properly denied since a $250 civil penalty would still be appropriate.

Kris Ikejiri, for complainant.
Robert Bernstein, Fairfield, California, for respondent.
William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), in which Administrative Law Judge William J. Weber (ALJ) filed an initial Decision and Order on April 15, 1986, assessing a civil penalty of $250 against respondent for importing one cacao pod from El Salvador into the United States in violation of the Act and regulations.

On May 2, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR

§ 2.35).[1] The case was referred to the Judicial Officer for decision on June 9, 1986.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service. The complaint alleged, *inter alia,* that Rene Vallalta, respondent, violated the Plant Quarantine Act, as amended (PQA) (7 U.S.C. § 151 *et seq.*), and regulations promulgated thereunder (7 CFR Part 319). Paragraph II of the complaint alleged that the respondent imported from El Salvador into New Orleans, Louisiana, approximately one (1) cacao seed pod in violation of section 319.56 of the regulations (7 CFR § 319.56), because the importation of cacao seeds is prohibited.

In his answer, the respondent admitted all of the material facts in the complaint. However, the respondent claimed that he did not know that he had the prohibited article. Respondent stated that a relative had placed the article in his bags without his knowledge. Respondent requested a hearing.

Complainant objected to respondent's request for a hearing because, by respondent's admission, there were no material issues of fact. Complainant further requested that the civil penalty of $250, as requested in the complaint, be imposed. In light of the Judicial Officer's decision in, *In re Richard Duran Lopez,* P. Q. Docket No. 59, I certified the following questions to the judicial officer:

1. Should respondent's motion for hearing be denied?

2. If no hearing is appropriate and if complainant files a motion for a decision on the pleadings, should that decision be entered finding a violation and assessing a $250.00 civil penalty against respondent Rene Vallalta?

[1] The certification was necessary to determine if "unintentional" in the *Lopez* decision is to be construed to include "un-

knowing". The Judicial Officer answered that respondent's motion for hearing should be denied and that the $250.00 civil penalty should be imposed.

WHEREFORE, in light of the Judicial Officer's answer and the complainant's motion for a decision on the pleadings, the following Findings of Fact, Conclusions, and Order shall be issued.

FINDINGS OF FACT

1. Rene Vallalta, respondent herein, is an individual whose mailing address is 2214 Burgundy Way, Fairfield, California 94533.

2. On or about August 26, 1985, the respondent imported from El Salvador into New Orleans, Louisiana, approximately one (1) cacao seed pod, in violation of section 319.56 of the regulations (7 CFR § 319.56) because the importation of cacao seed pods is prohibited.

CONCLUSIONS

By reasons of the facts alleged herein, respondent violated the PQA and regulations promulgated thereunder. Therefore, the following order shall be issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is governed by the principles set forth in *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), a copy of which is attached as an appendix.

Respondent contends that this case is distinguishable from *Lopez* because in *Lopez*, the respondent knew that he had one piece of sugarcane in his possession, but did not know that it was unlawful to bring it into the United States, whereas here, respondent's relative placed the prohibited cacao pod in his luggage, without his knowledge. However, that distinction is not material. As explained in *Lopez*, in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws. If that policy were not followed where forbidden items were placed in luggage by relatives or friends of the violator, a loophole would be created that could prove disastrous to American agriculture. Accordingly, the *Lopez* doctrine will be followed here.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent Rene Vallalto is assessed a civil penalty of $250, which shall be payable to the "Treasurer of the United States," by certified check or money order, and it shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, U.S. Department of Agriculture, Washington, D.C. 20250-1400, within 30 days from the service of this order.

APPENDIX

In re Lopez, 44 Agric. Dec. ___ (Oct. 7, 1985).
[This decision is referenced only. Not printed.—Ed.]

In re: PAULINE ANGELA HUDSON, PQ Docket No. 141. Decided March 19, 1986.

Imported fruit without permit—Civil Penalty—Default.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

vided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Pauline Angela Hudson, respondent, is an individual whose address is 112-39 203rd Street, St. Albans, New York 11412.

2. On or about April 26, 1985, at John F. Kennedy International Airport, respondent imported ten mangoes from Jamaica into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By her silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Pauline Angela Hudson is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded toFronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal* to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 23, 1986.—Ed.]

In re: GLOBAL VAN LINES, PQ Docket No. 241. Decided June 25, 1986.

Movement of household articles interstate—Civil Penalty—Consent.

Clement McGovern, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912 as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 318.13 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Global Van Lines, respondent, is a corporation incorporated under the laws of the State of California and having its principle place of business at #1 Global Way, Anaheim, California 92803.

2. On or about September 4, 1985, respondent moved outdoor household articles from Stoney Brook, Suffolk County, New York to San Diego, California.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred and seventy-five dollars ($375.00). The respondent shall send, payable to the "Treasurer of the United States," a certified check or money order to Clement J. McGovern, Esq., Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: MANUEL NORIEGA, PQ Docket No. 143. Decided May 1, 1986.

Fruit imported without permit—Civil Penalty.

Fronda Woods, for complainant.
Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)). The Office of the Hearing Clerk mailed to respondent, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act. The Postal Service returned the documents unclaimed. The Hearing Clerk then remailed the documents by regular mail. This constitutes service under section 1.147(b)(3) of the Rules of Practice applicable to this proceeding. (7 CFR § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136), respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of

the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Manuel Noriega, respondent, is an individual whose address is 1840 Rockwood, Apt. 67, Calexico, California 92331.

2. On or about October 23, 1984, at Calexico, California, respondent imported 26 limes and two plums from Mexico into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Manuel Noriega is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after

service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and Order became final and effective on June 26, 1986.—Ed.]

AGRICULTURAL MARKETING AGREEMENT ACT, 1937 PAGE

AUDIT BY MARKET ADMINISTRATOR

Authority to examine books and records 928

Confidentiality of books and records 928

COURT DECISION

U.S. District Court, Northern District of Illinois, Eastern Division, Judicial Officer's Decision and Order affirmed 923

HANDLER

Partially regulated, Secretary's jurisdiction over 928

ANIMAL QUARANTINE AND RELATED LAWS

CIVIL PENALTY

Of $100.00 944

Of $150.00 939, 940, 948

Of $500.00 950, 962

Of $700.00 954

Of $750.00 953

Of $1,000.00 952

Of $1,000.00 ($500.00 per violation) 963

Of $1,500.00 942

Of $2,000.00, abeyance as long as compliance with order 967

Of $2,500.00 ($500.00 per violation) 956

Of $3,500.00, total for 2 respondents 942

Of $6,000.00 947

CEASE AND DESIST

Operation of facility for garbage treatment and feeding garbage to swine 967

DISMISSAL

For good cause 969

ANIMAL QUARANTINE AND RELATED LAWS—Cont.

VETERINARY ACCREDITATION PAGE

Suspended for 3 months..... 965

ANIMAL WELFARE ACT

ANNUAL REPORT

Failure to file..... 978

CIVIL PENALTY

Of $100.00..... 978

Of $250.00..... 979

Of $600.00..... 970

Of $1,000.00..... 981, 982, 984

Of $1,500.00..... 976

Of $5,000.00..... 984

DISEASE CONTROL

Failure to maintain program for..... 970

DISMISSAL

For good cause shown..... 987

FACILITIES

Food and bedding, storage of..... 976

Improper contruction material..... 982

Improper marine housing..... 982

Improper sanitation..... 979

Improper storage of food..... 979

Interior surfaces, construction and maintenance of..... 976

Overcrowding..... 979

LICENSE

Cease and desist from engaging in business for which license is required..... 981

Engaged in business without securing..... 979, 981

ANIMAL WELFARE ACT—Cont.

SUSPENSION PAGE

Suspended for:

14 days and thereafter until in compliance....984

30 days and thereafter until in compliance....985

FEDERAL MEAT INSPECTION ACT

DISMISSAL

For good cause shown....988

PACKERS AND STOCKYARDS ACT, 1921

ACCOUNTS AND RECORDS

Failure to maintain accurately....1128

Keep accurate records pertaining to all bills, invoices, and other transactions....1106

AMENDMENT OF ORDER

Amended to provide date for full restoration....1133

APPEAL

Not timely filed, dismissed....1131

BONDING REQUIREMENT

Failure to comply with....991, 1065, 1068, 1070, 1079, 1117

CHECKS OR DRAFTS

Issuing insufficient funds checks....1062, 1079, 1083

CIVIL PENALTY

PACKERS AND STOCKYARDS ACT, 1921—Cont.

CIVIL PENALTY—Cont. PAGE

Of $17,000.00 ... 1120

Of $20,000.00 ... 1053, 1055, 1106

Of $25,000.00 ... 1071, 1073

Of $50,000.00 ... 995, 1034

COMMERCIAL BRIBERY

Giving gifts related to purchase ... 1053

Making payments to buyers ... 1034

Preferential payments ... 1077

Violation of P&S Act ... 995

CUSTODIAL ACCOUNT

Failure to deposit sale proceeds into ... 993, 1122

Mismanagement of ... 1062, 1071

DEALER

Issuing insufficient funds checks ... 1090

Must maintain adequate bond ... 1088, 1108, 1116

Prohibited from engaging in business subject to Act ... 1128

Suspension, bonding required ... 1116

Suspension, inadequate bond ... 1087

Suspended as registrant ... 1114, 1128

DEALER AND MARKET AGENCY

Suspended as registrant ... 1085, 1120, 1122, 1128

DISMISSAL

Of complaint, payment in full ... 1135

Of portion of complaint by complainant ... 1135

INSOLVENCY

Engaging in business while current liabilities exceed current assets ... 993, 1132

PACKERS AND STOCKYARDS ACT, 1921—Cont.

MISREPRESENTATION PAGE

Of livestock weights 989, 1055

Through false documentation 989

PACKER

Issuing insufficient funds checks 1073

PAYMENT

Failure to pay full purchase price 1051, 1114, 1128

Failure to pay when due 1073, 1090, 1128

PROHIBITED FROM ENGAGING IN BUSINESS

60 days, respondent Joe P. Riley 989

90 days, respondent Jeffrey M. Riley 989

PURCHASE PRICE

Failure to pay and/or failure to pay when due 1116

Failure to pay full purchase price 991, 1077, 1083, 1122

REPARATIONS AWARD

Complainant due balance for agency purchases 1135

SCALES AND WEIGHING

Cease and desist from weighing livestock at other than true and correct weights 989

SHIPPERS' PROCEEDS ACCOUNT

Failure to maintain properly 1120

PACKERS AND STOCKYARDS ACT, 1921—Cont.

SUSPENSION OF REGISTRATION PAGE

Suspended for:

7 days and thereafter until no longer insolvent and shortage in Custodial Account for Shippers' Proceeds has been eliminated....1120

21 days and thereafter until liabilities do not exceed assets....993

2 years and thereafter if insolvent....1090

5 years and thereafter until in compliance with bonding requirements....1065

5 years or less if payment is made in full....1116

Until in compliance with bonding requirements....1066, 1085

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

ACCEPTANCE OF COMMODITY

Admission of....1268

ACCOUNTINGS

Failure to keep accurate records....1280, 1333, 1358

ADMISSION

Of debt for produce....1292

Of indebtedness...1279, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303

Of liability....1323, 1324, 1325, 1350, 1352, 1353

BANKRUPTCY

Continues reparation action after discharge....1395

Reparation action continued....1392

BROKER

Memorandum determined terms in absence of agreement....1276

CONTRACT

Fails to specify quality....1320

Granting of protection and handling proven....1303

New price agreement....1361

CONTRACT—Cont.

Oral modification binding.....

Period of protection disputed.....

Respondent proved allowance given.....

CONTRACT PRICE

Disputed price adjustment.....

CONTRACT TERM

Broker statement assumed to be without basis.....

"Next week's market" price resolved as average for week.....

Price dispute.....

COUNTERCLAIM

Dismissal of.....

Dismissed, untimely filing.....

COURT DECISIONS

U.S. Court of Appeals, District of Columbia Circuit, Petition for review, denied.....

DAMAGES

Speculative profits cannot be basis of award.....

DEFAULT

Complaint improperly served.....

Not reopened, untimely filing.....

Order reopening after..... 1396

DELIVERED SALE

When standards absent, related standards and decisions can serve as criteria.....

DISMISSAL

After accepting full payment, cannot claim more.....

Complainant authorized dismissal of complaint.....

Denied, petition without merit.....

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

DISMISSAL—Cont.

PAGE

No additional payments due complainant 1345

Of complaint 1272

Respondent tendered payment in full 1370, 1376, 1377, 1380, 1394, 1364, 1365, 1367, 1368

Settlement reached 1369, 1393

FAILURE TO PAY PROMPTLY

License application denied 1203

License revoked 1199

License suspended 1152

Publication of the facts 1201

F.O.B. SALE

Purchaser responsible for freight expense 1276

Suitable shipping conditions warranty, breach of 1264

INDUSTRY TRADE CUSTOM

Guide to decisions under PACA 1215

LICENSE

Appeal of application denied 1153

Granted, suspended 90 days for violations 1211

RECONSIDERATION/REOPEN

Denied, appeal untimely 1379

Denied, paperwork backup not defense 1398

Dismissed, complainant's claims without merit 1378, 1379

Motion to reopen, granted 1394, 1396, 1397, 1398 1400, 1401

Petition for reconsideration, denied 1363

Petition for reopen, dismissed 1378

Respondent's petition without merit 1374

REJECTION

Wrongful, F.O.B. sale 1354

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

PAGE

REPARATION AWARDED

Balance due and owing 1268, 1274, 1276, 1279, 1283, 1286

Balance due and owing after damages 1279

Balance due and owing less damages 1264

Balance due and owing on contracts and legal expenses 1245

Denied, receiver not burdened with temperature recorder calibration 1378

Reimbursement and expenses due 1215

Respondent now current with suppliers 1151

STAY ORDER

Pending filing of an answer to the petition for reconsideration 1369, 1375

Vacated 1371

Vacated, reparations recalculated 1372

WARRANTY

Breach of, failure to prove 1313

Breach proven by respondent 1326

PLANT QUARANTINE ACT

CIVIL PENALTY

Of $125.00 1405

Of $250.00 1408, 1415, 1421, 1424, 1427

Of $375.00 1402, 1426

Of $450.00 1409

Of $500.00 1417

Of $525.00 1406

Of $600.00 1420

Of $750.00 1411, 1418

Of $1,000.00 1403

Of $2,350.00 for airline, $125.00 each individual 1412

DISMISSAL PAGE

Motion by complainant....1415

GARBAGE

Foreign-origin garbage not in proper containers....1408

Stored regulated garbage aboard ship....1409

PROHIBITED/RESTRICTED ARTICLE

Fruit imported without merit....1424, 1427

Moved logs from moth high risk area through unregulated areas....1411

Movement of uninspected fruit....1418

Offered uninspected plants for shipment....1402

Released infected flowers without inspection....1403

Seed pod imported....1421

Uninspected meat products brought to Puerto Rico....1417

*U. S. GOVERNMENT PRINTING OFFICE:1987-516-293:62686